Pursuant to Article 22, Paragraph 2, Article 68, Paragraph 1, Item1 of the Law on Protection of Competition ("Official Gazette of the Republic of Serbia", No: 51/09), Article 192 of the General Administrative Procedure Act ("Official Gazette of the Federal Republic of Yugoslavia", No: 33/97 and 31/01 and "Official Gazette of the Republic of Serbia" No. 30/2010) and Articles 3 and 4 of the Regulation on Criteria for setting the amount to be paid on the basis of a measure for protection of competition and sanctions for procedural breaches, manner and terms of payment thereof and method for determination of respective measures ("Official Gazette of the Republic of Serbia", No. 30/2010), in proceeding instituted ex officio against the Joint Stock Company „Mlekara"10 Tomlinska Street, Subotica, represented by the Director, Dusan Grujic, and Joint Stock Company Dairy and Dairy Products Industry "Imlek",Industrijsko Naselje, Padinska Skela, Belgrade, represented by Director,Slobodan Petrovic, and through their joint proxies, attorneys Milica Subotic, Zarko S. Borovcanin and other attorneys employed by Law Company Jankovic,Popovic & Mitic, 37 Carli Caplin Str., Belgrade, the Council of the Commission, in making its decision on the measure to be imposed for protection of competion, at it's 14th session, held on 24th January 2011 issued the following

RESOLUTION

I. A MEASURE OF COMPETITON PROTECTION IS DETERMINED for Joint Stock Company "Mlekara" with its head-office in Subotica, 10 Tolminska Str., registered in the Register of Companies of the Republic of Serbia under reference number 08057036, as well as for Joint Stock Company Dairy and Dairy Products Industry "Imlek" with its head-office in Belgrade, Padinska Skela, NN Industrijsko naselje Str., registered in the Register of Companies of the Republic of Serbia, under reference number 07042701, as an obligation for payment of monetary amount of 1.92% out of total annual turnover realized in 2006, because of their abuse of dominant position on the relevant market of raw milk by dairies existing on the territory of the Republic of Serbia, by imposing unfair business conditions and applying dissimilar conditions to identical transactions with other trading parties on the market, as defined in the Decision issued by the Council of the Commission No. 5/0-02-135/09-18, dated 22nd May 2009.

II. Joint Stock Company "Mlekara" with its head-office in Subotica, 10 Tolminska Str. **IS OBLIGED** to undertake certain actions as a measure for protection of competition referred to in Paragraph 1 of the Law, in the form of monetary payment amounting to 1.92% out of total annual turnover realized in 2006, that is, 51.262.576.00 RSD (in letters: fifty one million two hundred sixty two thousands five hundred seventy six RSD) in favor of budget of the Republic of Serbia, with reference to the case number.

III. The Joint Stock Company Dairy and Dairy Products Industry "Imlek", with its head-office in Belgrade, Padinska Skela, NN Industrijsko naselje Str. **IS OBLIGED** to undertake certain actions as a measure for protection of competition referred to in Paragraph 1 of the Law, in the form of monetary payment amounting to 1.92% out of the total annual turnover realized in 2006, that is, 254.885.759.00 RSD (in letters:

two hundred fifty four millions eight hundred eighty five thousand seven hundred fifty nine RSD) in favor of budget of the Republic of Serbia, with reference to the case number.

IV A DEADLINE IS DETERMINED, which is a four months period for performing the obligation from Paragraphs 2 and 3 of the Law, from the day of receiving this Decision, under the threat of forced execution.

REASONING

By the ruling of Administrative Court no.15 U No. 10130/10 dated 22nd October 2010, the action of Dairy and Dairy Products Industry "Imlek" Belgrade and Joint Stock Company "Mlekara Subotica" (hereinafter: "dairies-members of DANUBE FOODS GROUP") was rejected and the Decision of the Commission for Protection Commission (hereinafter: "the Commission"), no. 5/0-02-135/09-18 dated 22nd May 2009, was confirmed.

By the Decision of Commission for Protection of Competition no. 5/0-02-135/09-18 dated 22nd May 2009, abuse of dominant position on the market of raw milk purchase by dairies on the territory of the Republic of Serbia was established, by their imposing of unfair business conditions and applying dissimilar conditions to identical transactions with other trading parties on the market.

Commission for Protection of Competition instituted an administrative proceeding ex officio in order to determine an administrative measure according to Article 57 of the Law on Protection of Competition ("Official Gazette of the Republic of Serbia" no.51/09, hereinafter: the Law). This proceeding was instituted in line with Article 114, Paragraph 1, and Article 115, Paragraph 1, of the General Administrative Procedure Act ("Official Gazette of the Federal Republic of Yugoslavia" no. 33/97 and 31/01 and "Official Gazette of the Republic of Serbia" No. 30/2010, hereinafter: APA), by delivering to the parties involved in procedure Notice containing call for submitting of their argumentation no. 5/0-02-607/2010-1 and no.5/0-02-607/2010-2, dated 20th December 2010.

The dairies-members of DANUBE FOODS GROUP were ordered by the Commission to provide their argumentation regarding Commission's Notice dated 20th December 2010, whereby their participation in the procedure was made possible, in accordance with Article 9, also relating to Article 132 of the APA.

In their response of 29th December 2010, the dairies-members of DANUBE FOODS GROUP underlined: imposibility for instituting the procedure for imposing of administrative measure concerning already finalized and closed primary procedure against "Imlek" and "Mlekara" Subotica, as it is contrary to provisions of Article 74, of the existing Law which, as stated by the parties involved in procedure, "prohibits" application of that Law to all procedures initiated under provisions contained in the previous Law ; such act is considered as a serious violation of generally accepted standards and, at the same time, violation of constitutional principle of prohibition of retroactive law enforcement; impossibility of conducting a special, additional, i.e. supplemental inquiry for determination of such measure, in terms of Article 38 Paragraph 3, of the Law in force, stipulating that the procedure investigating a

violation includes also imposing of administrative measure; impossibility of imposing the measure after the expiry period of 3 years, from the date the act of violation was performed; otherwise, as stated by the parties involved in procedure, it would be contrary to Article 68, Paragraph 3, of the Law in force. Further in the text, they clearly indicate that, upon establishment of violation of competition, they expected an infringement proceeding to be instituted, but on other hand, they underline that the Commission's Decision to initiate such a procedure is illegal, and imposing of administrative measure would be considered as even more serious breach of Law, fundamental legal principles and complete non-observance of legal and constitutional principles and accordingly, it is absolutely null and void legal act. Finally, they emphasize that Commission's notice dated 06th December 2010: does not fulfill necessary requirements from the standpoint of EU Law: dairy was not given sufficient time to submit its argumentation; it doesn't contain any factual or legal criteria on the basis of which a fine could be imposed, as stated in opinion enclosed by the Dutch Law Office De Brauw Blackstone Westbroek N.V., dated 27th December 2010.

In their response dated 29th December 2010, the dairies-members of DANUBE FOODS GOUP do not challenge acquisition of relevant turnover in the amount stated in the Commission's Notice.

After all circumstances of the given case were considered by the Commission as well as statements from the responses of the parties involved, the Commission made a decision as stated.

Assessing the possibility of instituting the procedure as well as application of administrative measures in given situation, based on the Final Decision of the Council of the Commission, issued pursuant to the previous Law, the Council of the Commission took the legal position under which, in such factual and legal situation, it is necessary to initiate the procedure for imposing of administrative measures referred to in Article 68, relating also to Article 57, Paragraph 1, of the Law.

The procedure started according to previous Law on Protection of Competition, ("Official Gazette of the Republic of Serbia" 79/05, hereinafter: previous Law), thus the application of its provisions is indisputable. In accordance with the provisions of the former i.e. previous Law in force, a violation was established, whereas establishment of infringement liability could not be made because there were no regulatory and institutional prerequisites. However, it is also indisputable that the procedure, under established violation, has to be finalized, which means that the relevant procedure cannot be suspended or interrupted, on the grounds of alleged legal gap.
Namely, considering the aim of the Law and entrusted powers provided for in Article 21, Paragraph 1, Item 2, of the Law, the Commission is obliged to implement the procedure of competition protection to the end. As the purpose and the aim of the Law is not just establishment of act violating competition i.e. in given case in abuse of dominant position on the market, but also application of infringement measures i.e. administrative measures for protection of competition, thus this procedure is not contrary to Article 74, of the Law. It is a matter of application of the only possible set of legal norms to the given case, because of an objective and without the Commission's will independently occurred circumstances that, due to the process of regulatory changes, an application of infringement responsibility is excluded.

As a supporting evidence to the above stated, there is a generally accepted principle of legal certainty in criminal law implemented in the Constitution of the Republic of Serbia; sanction is to be determined pursuant to the regulation in force at the time when the act was performed, except when the subsequent regulation is more favorable for the offender. Taking into consideration that, according to its legal nature, the competition protection measure from Article 68, of the Law is exactly a criminal measure, the Commission is of opinion that in given case, in terms of sanction, a new Law has to be applied, since it is more favorable for the offender, particularly because of the following: abuse of dominant position on the relevant market is not considered as a violation which, among other things, means that the responsible person is not liable for infringement; only an upper limit (10%) in determining of monetary amount as a measure for protection of competition prescribed, whereas the previous Law provided also for a lower limit of 1% for determining of the amount of fine; obligation for imposing of protection of competition in the form of seizure of objects and prohibition of performing certain transaction is not provided for, which would be obligatory in case of application of the previous Law, according to Article 73; the Commission cannot determine deadline for the payment as a measure for protection of competition for the period shorter than 3 months whereas, by the previous Law, such deadline would be a general deadline of 8 days from the date the decision on infringement becomes final.

In support of this point, there is a viewpoint of the Court of Minor Offence. Namely, according to submitted requests for conducting infringement proceeding against other market participants in identical legal situations, courts of minor offense in their decisions, such as the ruling of Senior Magistrates Court in Belgrade 15-PRŽ-No.7115/10 dated 09th March 2010, or Decision issued by Magistrates Court in Belgrade, 100 PR. No. 397030/10 dated 23rd September 2010, established that the Law represents more mitigating regulations for offenders.
The stated Decision of the Senior Magistrates Court in Belgrade even explicitly contains that later regulation should be applied, as more favorable for the offender i.e. the Law on Protection of Competition ("Official Gazette of the Republic of Serbia" No.51/09) which does not stipulate the act of violation of competition as an infringement. Bearing in mind that the Law on Protection of Competition ("Official Gazette of the Republic of Serbia 79/05), on the grounds of which the Final Decision dated 22nd May 2009 was issued, provided for the infringement measures against market participants, and taking into consideration that the Law doesn't stipulate such measures, it is not possible to legally determine any infringement liability of the stated parties.

An opposite standpoint that instituting the procedure for imposing of administrative measures is prohibited, would mean that the conduct of market participants representing undisputedly established act of competition violation, remain without legal sanction, in which case decisions of the Commission would represent only a resolution (a declarative decision) which is contrary to the aim and purpose of the Law.

Also, it is not an obstacle if the procedure for imposing of administrative measure is performed after the finalization of procedure by which the competition violation has been determined, because the essence of the provision of Article 38, Paragraph 3,

of the Law is that administrative measure has to be imposed (obligation to impose an administrative measure as a consequence of the violation determined), and time period of instituting the procedure is not of significance.

Regarding the submitted objection for impossibility to impose measure upon the expiry of 3 years from the date the act of violation was committed, hence- as stated by parties involved in the procedure- that would be contrary to Article 68, Paragraph 3, of the Law, we have to take into consideration a fact that under the previous Law, administrative measure was imposed after the legal validity of violation was determined (obsolescence was not provided for because a measure of ''prohibition'' was imposed and not ''monetary'' measure), while, according to the present Law, it is an integral part of decision establishing violation (Article 38,Paragraph 3, of the Law) thus it does not apply to retroactive application of the present Law to circumstances that were not defined in the previous Law, but is a matter of applying more favorable Law for the party (Article 6, Paragraph 3, of the APA) whereas such legal understanding is not contrary to the provision of Article 74,of the Law. Obsolescence hasn't occurred because the deadline period of 3 years did not expire from the date of performing last act relating to the date on which the Commission issued its Decision in 2009.

Stated response of the parties also contains that the legal certainty of the parties involved in procedure (relating to expected sanction),concerning instituting and conducting the procedure for imposing of relevant legal sanctions (sanction for infringement or an administrative measure) is not jeopardized because, according to the statements of the parties themselves, it is expected as inevitable that an initiation of procedure for imposing of appropriate sanctions will follow (Paragraphs 1 and 2 of the motion mentioned).Thus, the fact that the Commission decided to institute the procedure for imposing administrative measures which are more mitigating to the offender, doesn't jeopardize in any way parties' rights, not only as concerns their legal certainty but also in regard to legislation and equality in treatment in the process. Exactly the opposite: all of those principles would be grossly tramped if only these parties remained without expected (as stated even by themselves) sanctions for their illegal conduct

However, only establishment of abuse of dominant position i.e. of an act representing violation of competition, without imposing measure for competition protection, would be considered as a complete absurdity in the application of the Law. In that sense, the Commission especially underlines the importance of a cause-consequence relation which must exist between the act considered as a violation of competition, and measure whose purpose i.e. aim is not, and cannot be just an imposing of measure to market participant who committed the act but its importance must be observed in the context of the effect it has on other market participants and to contribution to development of awareness on competition law, as well as providing competition efficiency.

Council of the Commission specifically emphasized significance of the principle of the citizens' rights and public interest protection, determined by Article 6 of the General Administrative Procedure Act which precisely defines the responsibility of the authority i.e. organization conducting administrative procedure to protect public interest. Term *public interest* should and must be understood as a standard form of

general interest by realization of which certain vital needs of the society as a whole, or its individual considerable parts, are met. According to the assessment of Council of the Commission, in given case it means satisfying of the vital needs of the society; regulations to be consistently implemented and competent government authorities i.e. organizations such as Commission, to apply all law-based legal means in order to meet the aim of the Law i.e. to provide the competition protection. It is absolutely impossible to suggest that a legislator had an intention to give up the principle of legality in the sense that it didn't provide for any sanction for acts committed in the transitional period i.e. for initiated but not finalized procedures, until the beginning of the application of the Law.

It is important to say that all statements given by the parties that the Commission's notice, dated 06th December 2010 does not meet necessary requirements based on EU law, that there was not sufficient time given to the dairy to prepare its statement; that the notice does not contain any factual or legal criteria on the grounds of which a fine could be imposed are unfounded, as these statements are contrary to situation in the files.

While determining the level of the amount of the measure for protection of competition, the Council of the Commission took into account the fact that dairies-members of DANUBE FOODS GROUP didn't challenge data submitted by the Commission in the motion dated 20th December 2011, relating to realized annual turnover reported as business profit in financial statements. Consequently, the Commission concluded that all official and publicly available data accessible to Commission during procedure, relating to the level of turnover of the dairies-members of DANUBE FOODS GROUP, are accurate and indisputable.

Namely, the Commission's standpoint is that in given case it is necessary to take into consideration business profit (as a part of total annual turnover of the company) realized by those companies on the markets where they perform their entire activities. Such a viewpoint is primarily determined by the fact that on the raw milk purchase market, which is in Commission's procedure no.5/0-02-135/09 defined as relevant market, the dairies act as the buyers of raw milk from the primary producers for its further processing, and not for its turnover/sale to other purchasers. It is a fact that dairies process purchased raw milk into milk and dairy products in order to sell them, which leads to conclusion that they are simultaneously active on several different product markets, on the supply market (purchase) of raw milk, as a row material used in production of a whole line of products, as the first market, as well as on the market of sale of different milk products, as a second market where those companies make profit. On the first of listed markets, the dairies act as the buyers and their activity in fact, on that market doesn't generate any income for the company. That is the reason why as relevant turnover of the company, is considered turnover realized by sale of different kinds of milk and dairy products produced from purchased raw milk (pursuant to the financial statements, this turnover is called "business profit" while in the profit and loss account of the company it is entered as AOP201)

In determining the level of the amount of measure, the Commission considered the following:

Taking into consideration that in December 2007, the status change concerning merger by acquisition of AD, IMLEK was registered, as the company-acquirer, and AD Novosadska Mlekara, as the company that, due to status change, stopped to exist without liquidation, in determining the measure for competition protection for IMLEK, financial indicators for AD Novosadska mlekara, realized within relevant period are also taken into account.

According to official and publicly available data, contained in the financial statements for 2006, which the companies, parties involved in procedure submitted to National Bank of Serbia and published on their internet sites, turnover realized in 2006, reported in the balance sheet as the business profit, was in the following amounts: for Imlek 10.249.337.000.00 RSD; for Novosadska mlekara 2.623.681.000.00 RSD i.e. in total 12.873.018.000.00 RSD, and for Mlekara Subotica 2.589.019.000.00 RSD; realized total annual turnover, pursuant to Article 7, of the Law, contained in the same statements for the year 2006 was as following: for IMLEK in amount of 10.554.699.000.00 RSD, for Novosadska mlekara in the amount of 2.697.250.000.00 RSD i.e. in total 13.251.949.000.00 RSD and for Mlekara Subotica 2.669.837.000.00 RSD.

In procedure for determining of the measure for competition protection, the Commission applied provisions of Article 57, Paragraph 2, and Article 68, Paragraph 1, Item 1, of the Law, and Article 3, of the Regulation on Criteria for Determining the Amount of the Measure, being in force for both parties.

According to the gravity, consequences and duration of a violation of competition, the Commission took the position that the established act of abuse constitutes by itself a serious violation, which is also indicated by the practice, as well as by guidelines for determining the level of amount, of national competition authorities in EU. The violation lasted at least for 3 years, that is, it was indisputably proved that the violation begun at the latest in April 2005 and lasted at least until 1st March 2008 (when the Tariff was made by standards defined by Commission and published). Acts were undertaken against a large number of purchasers – primary producers on the territory of the whole country, which was established in legally binding and finalized procedure for establishment of abuse of dominant position.

The Commission found the following circumstances as mitigating: the party did not previously undertake acts considered as a violation of competition (there was no repetition), nor encouraged other market participants to perform the acts having or which may have as their aim or consequence a significant restriction, distortion or prevention of competition; the participant suspended all acts considered as a violation of competition; by its own acts removed the consequences of the violation of competition to the significant extent before the Decision became legally binding; dairies –members of DANUBE FOOD GROUP voluntary cooperated with the Commission with an aim to finalize the procedure for establishment of abuse in a faster, more efficient and more cost effective manner; as well as time period from the date the violation was committed till the date of instituting this procedure for determination of measures for competition protection.

In determining the level of imposed measure, the Commission complied to both analytical and synthetic methods, when determining the level of imposed measure,

based on the comprehensive evaluation of all circumstances, both mitigating and aggravating, therefore the imposed measure is considered as a fair and logical result of all circumstances, always bearing in mind the purpose of imposing such measures.

In determining the level of the measure for competition protection, by an insight into the files of the Commission's case no. 5/0-02-135/09-18, and in line with Article 57, Paragraph 2, and Article 68, Paragraph 1, Item 1, of the Law and the Article 3, of the Regulation on Criteria for Setting the Amount to be Paid on the basis of a Measure, the Commission concluded that stated circumstances i.e. criteria apply to both dairies-members. According to Article 68, Paragraph1, of the Law, it is stipulated for the measure for competition protection to be determined in percentage in relation to the total annual turnover of the market participants, under the legal maximum of up to 10%. Bearing in mind that the dairies-members of DANUBE FOODS GROUP are affiliated market participants, thus pursuant to the Law are considered as single market participant, the Commission determined the measure in the same percentage for both dairies. But, the concept of affiliated market participants, considered in terms of Law as single market participant, is of factual and legal nature and not of procedural-legal nature in terms of the APA; out of which follows that Imlek an Mlekara Subotica represent two and not just one party in this procedure. Moreover, these companies represent two legal persons having all elements i.e. meeting all conditions stipulated by the Law on Companies, as separate legal entities. As such, they have different total annual turnovers. If the Commission would determine the measure in percentage in relation to the annual turnover, but it wouldn't nominally determine a monetary amount charged to each of these companies, it could lead to one of these affiliated participants to pay, on account of the measure, an amount higher than the amount determined in percentage. In addition, Article 57, Paragraph 6 of the Law, stipulates that " for measures determined against the forms of affiliation of market participants, all affiliate members are jointly and severally liable and may jointly or individually make payments, if the affiliation is unable to effect payment or does not posses its own funds''. From the stated Regulation, it can be concluded that joint and several liability in terms of payment is actually an exception rather than the rule. In given case, there are no fulfilled conditions from this provision of the Law; thus, in the second and third paragraph of its submission, the Commission determined nominal monetary amounts charging each party individually. In favor of this, there is a provision of Article 57, Paragraph 6, of the Law stating that forced collection is carried out in relation to the party and, as the term of affiliated participants, considered as a single market participant, is the term of factual and legal rather than of procedural and legal nature, thus these two affiliated companies represent two, not one party in the procedure. Furthermore, although the measure for competition protection, according to Article 57, Paragraph 1 of the Law is a kind of administrative measure, it, by its essence, represents sanction for market participant i.e. it is of a punitive character.

By applying the criterion of severity, consequences and duration of the violation of competition, and bearing in mind all established mitigating circumstances, the Council of the Commission determined the measure for competition protection in the amount of 1.92% out of the total realized turnover in 2006, which for Imlek amounts to 254.885.759 RSD and for Mlekara Subotica 51.262.576 RSD. (We emphasize that

these monetary amounts actually represent 1.98% of realized business incomes of the dairies-members of DANUBE FOODS GROUP).

Pursuant to Article 57, Paragraphs 1, 2 and 3, Article 68, Paragraph 1, Item 1, of the Law, it is decided as in Paragraphs I, II and III of the above Decision.

A deadline for acting in accordance to the order contained in Paragraph IV in the above mentioned, is determined on the grounds of Article 68, Paragraph 2, of the Law and Article 4 of the Regulation on Criteria for Setting the Amount to be Paid on the basis of a Measure for Competition Protection and Sanctions for Procedural Breaches, Manner and Terms of Payment Thereof and Method for Determination of Respective Measures.

CHAIRMAN OF THE COUNCIL
Vesna Jankovic, President of the Commission

LEGAL REMEDIES

This Decision is final in an administrative procedure.
Against this Decision, there is no appeal to be allowed, but an administration dispute may be instituted by an action submitted to the Administrative Court, within 30 days from the day of receiving the Decision.