Republic of Serbia
COMMISSION FOR PROTECTION OF COMPETITION
25/IV Savska St., Belgrade
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MINISTRY OF PUBLIC ADMINISTRATION AND LOCAL SELF-GOVERNMENT

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Upon considering the material submitted – Draft Law on Amendments to the Law on Free Access to Information of Public Importance, pursuant to Article 21(1/7) of the Law on Protection of Competition (Official Gazette of the RS 51/09 and 95/13), at the 162nd session held on August 3, 2018, the Council of the Commission for Protection of Competition issues the following

OPINION

After reviewing the acts presented for public consultation, published on the website of the Ministry of Public Administration and Local Self-Government, it is noted that the Public consultation on the Draft Law on Amendments to the Law on Free Access to Information of Public Importance was held from March 22 through April 19, 2018. Having regard that the Commission for Protection of Competition is one of the public authorities that decide on requests for access to information of public importance, we hereby propose the following amendments that we consider necessary in view of the relations between this Draft and the Law on Protection of Competition.

I Article 4 of the Draft stipulates the following:

In the title of Article 9, replacing the conjunction "and" with comma after the wording "national welfare", and adding comma and the wording "intellectual and industrial property, art and cultural goods" after "secret".

In Article 9, amending the introductory wording to read:

„Unless there is an overriding public interest in disclosure, the public authority may deny or limit the right of an applicant to access information of public importance if it would thereby:".

In item 2), adding the wording „administrative proceedings" after "enforcement of sentences", and adding comma and the wording „until the completion of proceedings" after „fair trial".

In item 5), replacing the wording “state, official, commercial or other” with “classified information or represent a trade secret or professional secrecy”, and replacing “for the access to information” with “public interest in disclosure”.

After item 5), adding item 6) to read:

“6) infringed the intellectual or industry property rights, jeopardized the protection of art and cultural goods, by making and forwarding a copy of the document.”

With a view to removing obstacles to the conduct of the work of the Commission for Protection of Competition (hereinafter, the Commission) and the Commissioner for Information of Public Importance and Personal Data Protection (hereinafter, the Commissioner), we hereby propose adding new paragraph 6) in Article 4 to read:

After paragraph 1, adding new paragraph 2 to read:

„It shall be considered that there is no overriding public interest in disclosure if a particular measure of protection of sources or specific information (protected information) is set in accordance with regulations governing competition policy.”

The acceptance of the amendment as presented above would address the competence concerns between the Commission and the Commissioner, and ensure the reliability and stability of the legal system that clearly specifies and ensures the compliance with legally established competences of authorities deciding on their rights, obligations and interests.

In the proceedings conducted before competition authorities, including the Commission for Protection of Competition and the European Commission (infringements of competition, merger controls, sector inquiries, etc.), undertakings submit numerous, highly sensitive business information, such as information on suppliers and buyers, value and volume of sales and procurements, market shares, reasons for mergers and acquisitions, agreements, acts containing business plans and future investment development and operational strategies, etc., without which the Commission would not be able to act in accordance with its competences stipulated by the law. Significant harm to interests of undertakings supplying such information could be caused if they would be disclosed to third parties, thus rendering necessary the introduction of a rule in comparative practices of competition authorities, stipulating the right not to submit, i.e. disclose or make available any part of information or documents containing trade secrets or other sensitive information to third parties that the respective authorities believe should be kept undisclosed, implemented in order to ensure the conduct of proceedings and protection of commercial interests of undertakings.

The said practice is also generally accepted in the EU competition law, since the European Commission Notice on the rules for access to the Commission file in merger and antitrust cases, the Guidance on the preparation of public versions of Commission Decisions adopted under the Merger Regulation, as well as the Guidance on the preparation of public versions of Commission Decisions adopted pursuant to Regulation 1/2003, provide examples that information on buyers, distributors, marketing plans, cost, price structure and sales strategy are information qualified as business secrets which cannot be disclosed.

Thus, the significance of accepting proposals of the Commission provided for the purpose of amending the Law on Free Access to Information of Public Importance is highly notable, particularly giving consideration to the circumstances indicative of the rising trend pertaining to the implementation of rules governing access to files in antitrust cases, as well as that the protection of information in such cases is of paramount importance and regarded as highly

sensitive issue. If the Commission's proposal would not be considered, then the solution envisaged by the Commissioner would enable the access to business sensitive information in the possession of the Commission, previously protected at the request of a party by the Commission conclusion, and which do not have the status of information of public importance pursuant to Article 45(4) of the Law on Protection of Competition. In such manner, the work of the Commission as an autonomous and independent organization performing public competences in accordance with the Law would be jeopardized, in addition to compromising legal safety and rights of undertakings given that they would no longer undeniably know if their information would be protected and thus exempt from the free access.

Given the Commissioner's practice, the possibility of not allowing an applicant to exercise the right to access the requested information, pursuant to Article 9(5) of the Law on Free Access to Information of Public Importance, is limited by the need to demonstrate in each concrete case that the restriction of access to the requested information is justified in order to protect overriding interests. Namely, in addition to one of the requirements set out in Article 9(5) of the Law on Free Access to Information of Public Importance regulating the limitation of free access to information of public importance if such information or a document is classified as secret under the provisions of a regulation or official act, there is also the second requirement that needs to be met – that the disclosure of such information could have serious legal consequences or otherwise prejudice the interests that are protected by the law and override the public interest to access information. Such position is based on the provision of Article 8 of the Law on Free Access to Information of Public Importance where in paragraph 1 is stipulated that the rights provided for in this law may, in exceptional circumstances, be subject to the limitations set out in this law, to the extent necessary in a democratic society to prevent serious violations of overriding interests based on the Constitution and law.

The Commission is aware that the right of free access to information is a right of citizens guaranteed by the Constitution, as part of the right to information (Article 51 of the Constitution of the RS), where is stipulated that everyone has the right to access information kept by state bodies and organizations with delegated public powers, in accordance with the law. In line with the said right to information, the Commission also acknowledges the significance of openness, transparency and information of citizens of the RS, as well as the principle that the Commission decisions need to be taken as openly and closely as possible to the citizens.

However, the increasing number of proceedings conducted by the Commission (as well as other competition authorities in comparative practice) increases the possibility of disclosing business and other sensitive information by the Commission, made available during the proceedings. That calls for a caution among undertakings and a need to be aware of rules governing protection of information in proceedings conducted before the Commission in order to keep their trade secrets and prevent their disclosure, while the Law on Protection of Competition, in that sense, is enabling them to file a request for protection of information. In line with the generally accepted comparative practice, the protection may be requested for two types of information: for information representing a trade secret and for other sensitive information.

We hereby also use this occasion to indicate a problem occurring in the practice regarding the decision-making competence under the Law on Protection of Competition, on one hand, and the Law on Free Access to Information of Public Importance on the other. Namely, Article 45

of the Law on Protection of Competition stipulates that a measure of protection of sources or specific information (protected information) may be ordered if it is evaluated that the interest of an applicant is justified and substantially more important than the public interest. The Commission President decides on those requests, whereas a special appeal is allowed on which is decided by the Council. In Article 45(4) **is stipulated that such protected information do not have the status of information of public importance in terms of the law governing free access to information of public importance.**

Regardless of that provision, on May 4, 2018, the Commissioner for Information of Public Importance and Personal Data Protection has enacted Decision no. 07-00-00269/2016-03, ordering the Commission for Protection of Competition to immediately, and no longer than within five days from the date of receipt of related decision, submit requested information, that is, copies of documents, some of which were the subject of the Commission conclusion ordering the measure of protection of information. In such manner, the act of one authority derogated the act of another in a manner where business sensitive information, according to the Commission's assessment, fulfilling legal requirements for protection of information have become publicly available. In the rationale of his decision, the Commissioner stated that the protection of information in proceedings conducted pursuant to the provisions of the Law on Protection of Competition has full legal effect in those proceedings but not in proceedings pertaining to the exercise of the rights to access information of public importance. In doing so, the Commissioner has decided on the scope of implementation of one law and gave primacy in regulatory implementation, and in such manner has directly undermined legal certainty, although the Law on Protection of Competition explicitly states that protected information do not have the status of information of public importance.

The Administrative Court in its Decision *6. У 8525/18* of May 21, 2018, enacted by a single judge, rejected the statement of claims of the Commission for Protection of Competition submitted for the annulment of the Decision no. 07-00-00269/2016-03 of May 4, 2018, enacted by the Commissioner for Information of Public Importance and Personal Data Protection. The decision is based on the court's position that the Commission for Protection of Competition cannot be a party in an administrative dispute since in the Commissioner Decision was not decided on a right or legal interest of the Commission for Protection of Competition but on the obligation of the Commission for Protection of Competition, that as a competent authority and public body, comply with the request of the party, the claimant, within the meaning of Article 3, Article 5, Article 6 and Article 21 of the Law on Free Access to Information of Public Importance. In the Decision is concluded that in the concrete case, the statement of claims is submitted by an unauthorized person, for the reasons stated above, and that therefore exist no procedural and legal requirements to adjudicate on a dispute.

Also, we hereby refer to the fact that on July 9, 2018, the Commissioner has submitted the Proposal for the Assessment of Constitutionality of Article 45(4) of the Law on Protection of Competition (Official Gazette of the RS 51/09 and 95/13). In the Proposal is underlined that Article 1(1) of the Law on Free Access to Information of Public Importance regulates that said law governs the rights of access to information of public importance held by public authorities with a view to exercising and protecting the public interest in disclosure, and attaining a free democratic order and an open society. Furthermore, Article 8 of the Law on Free Access to Information of Public Importance stipulates that the rights provided for in this law may, in exceptional circumstances, be subject to limitations set out in this law, to the extent necessary in a democratic society to prevent serious violations of overriding interests based on the Constitution or law (the so-called, public interest test). The rights and interests

whose protection may constitute a ground for limitation are enumerated in the provisions of Article 9 and 14 of the Law on Free Access to Information of Public Importance, that is, the limitations of free access to information of public importance are listed exhaustively therein.

In that regard, the Commission underlines that it does not dispute the implementation of the provisions of the Law on Free Access to Information of Public Importance (Official Gazette of the RS 120/04, 54/07, 104/09 and 36/10), nor the competence, position and role of the Commissioner in terms of the right of access to information of public importance. However, we would like to point to serious consequences with regard to legal certainty of undertakings, that is, parties in the proceedings conducted before the Commission for Protection of Competition.

The comparative practice, for instance, in line with the information provided by the Organization for Economic Cooperation and Development (OECD) and the International Competition Network (ICN), also indicates that the rights of access and consultation of data considered confidential within the meaning of regulations governing competition policy are exempt from the implementation of rules governing access to information of public importance, precisely because of the importance of such information for antitrust proceedings and protection of commercial interests of undertakings. Although the underlining "conflict" between the right to access information of public importance (the right to information) and the right to business sensitive data protection is noticeable, it is resolved in favor of the rights of undertakings in a manner where authorities in charge of competition policy are enabled not to implement the rules on access to information of public importance in dealing with business sensitive information; or such exemptions are directly envisaged in regulations governing free access to information of public importance or in competition regulations (for instance, EU, Germany, France, United Kingdom of Great Britain and Northern Ireland, the Netherlands, Latvia, USA, Canada, Australia). These exemptions are narrowly defined, in so that they only relate to information designated as "confidential" (protected) by competition authorities, and do not affect the exercise of rights to access other information not designated as "confidential" or considered protected.

The reason for such regulation that govern protection of confidential information in competition law is explained by the role that competition authorities have in a country's legal system and importance of business sensitive information when analyzing the state of competition on a market and determining infringements of competition, where decisive facts and evidence in antitrust cases may be confidential.

In the EU practice, recommitted in the judicial practice (for instance, Judgment of the Court of First Instance of May 30, 2006, Bank Austria Creditanstalt AG v Commission no. T-198/03, ECR 2006, II-1429, p. 69), the Union's institutions, bodies, offices and agencies need to conduct their work as openly as possible and are obligated to secure a transparent decision-making procedure and to establish special procedural rules that will regulate the access to their documents and publishing of said documents. That means that EU institutions must be capable to make publicly available all decisions they enact, while the exemption to the rule may be envisaged so to prevent publishing of individual decisions or information contained therein, foremost owing to their commitment to safeguard professional secrecy.

The European Commission also has such an obligation, responsible to make as much information as possible available to the public, while it can only refrain from disclosing information to the extent that this is covered by its duty of professional secrecy or other

public policy exceptions. This practice is also applied in the implementation of competition rules when the European Commission is obligated to have regard to the legitimate interests of undertakings in the protection of their business secrets and other confidential information, and not to publish information received in the implementation of competition rules that represent trade secrets of undertakings. Information received by implementing competition rules may be used for the purposes of antitrust proceedings only.

In line with the tendency prevalent in the EU – to strengthen the competences of national competition authorities, the solutions envisaged by draft text of a new EU Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, should also be borne in mind. In line with this draft, access to the case files in antitrust proceedings does not extend to confidential information.

Accordingly, the Commission proposes that the conduct of the Commission for Protection of Competition be subject to the exemption from the implementation of the Law on Free Access to Information of Public Importance, since similar examples can be found in comparative practice (for instance, Germany, France, United Kingdom of Great Britain and Northern Ireland, the Netherlands[1], Latvia, Australia, Canada), and that the that the rights of access and consultation of data classified as confidential within the meaning of rules governing competition policy be generally exempt from the implementation of rules on access to information of public importance. The introduction of such exemption would further improve legal certainty and facilitate the submission of requests for protection of information for undertakings, as well as the acting of the Commission in deciding upon such requests and procedure in antitrust cases, particularly if the Commission cannot exercise the right to judicial protection in cases when the Commissioner orders the submission of protected information, which additionally limits the exercise of its delegated powers.

The significance of protection of information in competition law is high, since it advances the work of competition authorities and their credibility, while it builds up the trust that undertakings must have in these authorities which would otherwise be undermined if the protected information would be disclosed. The protection of information also prevents the exchange of information between undertakings (when such exchange may represent the core of cartel conducts) and related occurrence of competition infringements, in addition to securing an effective implementation of the Leniency program introduced in the competition law, but also prevents the consultation of data potentially significant for the economy, that is, economic interests of the Republic of Serbia (for instance, the Železara Smederevo Management Services Agreement, or the Airport "Nikola Tesla" Concession Agreement). Any subsequent disclosure of such information would impede both the proceedings and the competition policy as a policy system introduced in the Republic of Serbia, while the Commission would be faced with the action for damages arising from disclosure of trade secrets and confidential information.

The Commission reiterates its policy to assess the facts and evidence justifying the requests for protection of information in each individual case and the possibility to withhold access to

[1] For instance, in the Netherlands and United Kingdom of Great Britain and Northern Ireland is envisaged, inter alia, a general exemption from the implementation of rules on free access to information in cases when such exemptions are envisaged by other laws, which corresponds to the current situation in Serbia in terms of the relation between the Law on Protection of Competition and the Law on Free Access to Information of Public Importance.

the requested information, while such possible action is never pre-established. Therefore, there can be no question of any kind of misuse of power, as claimed by the Commissioner in the Proposal for Assessment of Constitutionality of Article 45(4) of the Law on Protection of Competition, as it is a case of regular comparative practice implemented towards the protection of commercial interests of undertakings. At the same time, it is also necessary to underline that the aforementioned does not relate to the protection of information created during the work and in connection with the "business" operation of the Commission, but concerns the protection of information of the parties and other undertakings. Also, the bottom line is that the Commission as an institution cannot disclose such information, and not that the "owner" of information cannot disclose them.

The Commission reflects on its built, long-standing practice in the implementation of Article 45 of the Law on Protection of Competition, according to which the overriding interest within the meaning of the Law on Free Access to Information of Public Importance is established in each concrete case when determining the measure of protection of information. The assessment of the "confidentiality" of information filed for protection means the assessment of the validity of interests of applicants for the protection of information and whether the importance of such interests is significantly greater than the public interest in disclosure. The information cannot be protected if it is assessed that the specified material cannot be considered as trade secret or other confidential information, whether such information be regarded as "trade secret" or "confidential" in the submissions or in the communication with the Commission. Hence the conclusion that the protection of information can be a valid basis to withhold access to the requested information, since it is a specific legal act enacted by a public authority based on the previously conducted assessment envisaged by the Law on Free Access to Information of Public Importance.

II Also, we hereby propose to amend Article 4(5) of the Draft in order to allow for full and complete compliance of the Law on Free Access to Information of Public Importance with Article 4 of the Regulation (EC) no 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and in that manner ensure adequate protection of commercial interests of undertakings submitting information to the Commission.

As mentioned, Article 4 of the Draft reads as follows:

> In the title of Article 9, replacing the conjunction "and" with comma after the wording "national welfare", and adding comma and the wording "intellectual and industrial property, art and cultural goods" after "secret".
>
> In Article 9, amending the introductory wording to read:
>
> „Unless there is an overriding public interest in disclosure, the public authority may deny or limit the right of an applicant to access information of public importance if it would thereby:".
>
> In item 2), adding the wording „administrative proceedings" after "enforcement of sentences", and adding comma and the wording „until the completion of proceedings" after „fair trial".
>
> In item 5), replacing the wording "state, official, commercial or other" with "classified information or represent a trade secret or professional secrecy", and replacing "for the access to information" with "public interest in disclosure".
>
> After item 5), adding item 6) to read:

"6) infringed the intellectual or industry property rights, jeopardized the protection of art and cultural goods, by making and forwarding a copy of the document."

We hereby recommend to amend Article 4(5) of the Draft to read:

> "After item 5), adding item 6) to read: 6) infringed the commercial interests of natural and legal persons, as well as the intellectual or industry property rights, jeopardized the protection of art and cultural goods, by making and forwarding a copy of the document."

Regulation (EC) 1049/2001, directly implemented in the EU and Member countries, regulates the right to access European Parliament, Council and Commission documents, while Article 4 therein stipulates restrictions of the right to access documents, that is, exemptions to the implementation of this regulation. The Law on Free Access to Information of Public Importance (including the amendments envisaged by the Draft) is substantially aligned with the Regulation (EC) 1049/2001 in terms of restricting the right to access information of public importance, except with regard to Article 4(2)(1) of the Regulation where is stipulated that EU institutions can refuse access to a document where disclosure would undermine the protection of commercial interests of natural or legal persons, including intellectual property, unless there is an overriding public interest in disclosure. Given that the Draft fails to mention the "protection of commercial interests", while the Law on Free Access to Information of Public Importance is in terms of other exemptions aligned with the above-mentioned EC Regulation, it is also necessary that the "commercial interests of natural or legal persons" be protected by the Law on Free Access to Information of Public Importance.

The Commission hereby refers to all of the above-presented reasons for amending the Draft given the nature of proceedings conducted before the Commission and information at the disposal of the Commission, in order to indicate the importance of introducing this exemption. That would enable the Commission to restrict the right to access to information of public importance by assessing the overriding interest in cases where the access to information is requested with respect to information not considered protected, as well as to ensure additional protection of interests of undertakings in cases where the access to protected information is requested.