IMPLEMENTATION OF ARTICLE 58 OF THE LAW ON PROTECTION OF COMPETITION

The adjournment of proceeding by proposing and taking the commitments by the party to proceeding is introduced as one of the most important novelty, by amending the Law on Protection of Competition ("Official Gazette of the RS", no. 51/2009 and 95/2013, hereinafter: the Law). The objective of this new legal solution to Article 58 of the Law is to arrange the institute of adjournment of procedure in more precise manner, and based on those provisions enable the Commission for Protection of Competition (hereinafter: the Commission), within the proceeding instituted for competition infringement investigation, to accept the commitments proposed by the party to proceeding with the ultimate goal of removing possible infringement. Foremost, this institute should be appreciated in the light of legislator's intent to contribute to the cost-efficiency of proceeding with no obligation of the Commission to establish the existence of infringement, with simultaneous elimination, affecting the competing parties, of disputable conditions on the market in a more expeditious and efficient manner. No less important is the circumstance that this institute is also favorable for an undertaking – party to proceeding, in a sense that is enabled to propose commitments on its own that achieve the objective of measures from Article 59 of the Law (measures for removal of competition infringement), without enacting a decision on infringement that would also imply determining a measure for protection of competition.

Article 58(1) of the Law foresees that the Commission, subsequent to accepting proposal of the party to proceeding and implementation of acts envisaged by Article 58(3) of the Law, may enact a conclusion on adjournment of investigation of competition infringement "and determine the measure referred to in Article 59 of this Law"… simultaneously determining the terms and conditions for executing measures thereof.

Determination of measure from Article 59 of the Law, in the meaning of quoted provision, shall mean the acceptance of proposed commitment that is ordered to the party to proceeding by the decision on adjournment of proceeding, and which is by its nature and type one of the measures prescribed by Article 59 of the Law (behavioral or structural measure).

Regardless of the previous circumstance, the commitment that is ordered by the decision on adjournment of proceeding must in any case fulfill the identical objectives due to which, in the proceeding of determining competition infringement and following the determination of infringement, in accordance with Article 59(2) of the Law, the measures proportional to the gravity of determined infringement are set.

Provision of Article 59(1) of the Law, in the meaning of implementation of Article 58 of the Law, in general and in each concrete case, has the meaning and objective to, via ordered commitments, remove every possibility of continued existence of reasonably assumed or future competition infringement, i.e. prevention, distortion, or restriction of competition. Each of proposed commitments, as well as all commitments in conjunction, must secure achieving of objectives as defined in Article 59 of the Law.

Behavioral measures from Article 59 as the objective have the removal of established competition infringement, that is, preventing probable occurrence of the same or similar infringement by giving orders to undertake certain behavior or prohibit certain behavior, while structural measures are determined if there is no possibility to set equal or similarly effective behavioral

measures, or if behavior measures constitute a greater burden for the undertaking than structural measure, that is, if the earlier imposed behavioral measure for the same competition infringement is not carried out in its full.

During 2014 and 2015, the Commission enacted decisions in several proceedings on proposal for adjournment of proceedings that all, with only one exception, referred to proceedings for determining infringement from Article 10 of the Law, and specifically on restrictive agreements concluded between competing parties. In order to secure legal safety for undertakings related to implementation of before mentioned provision of the Law, the Commission concluded that is necessary to inform the undertakings of the position taken in regards implementation of Article 58 of the Law.

It is necessary to emphasize that provisions of Article 58 of the Law, like in the case of any other article of the Law, cannot be considered, evaluated and implemented out the context of other provisions of the Law and provisions of other regulations enacted pursuant to the Law. Article 10 of the Law defines restrictive agreements and determines that they are prohibited and void, except in cases of exemption from the prohibition pursuant to the Law. Article 14 of the Law defines agreements of minor importance that are permissible, unless if the purpose of horizontal agreements is price setting or limitation of production or sales, or division of sourcing market, and also if the purpose of the vertical agreements is price setting, or division of market. This provision undoubtedly points to the conclusion that legislator has identified the listed infringement forms (price setting, division and limitation of market) as the most severe competition infringement forms, further confirming the aforesaid by the fact that their existence represent the competition infringement regardless of the size of market share of parties to agreement. Also, provisions of Article 5 of the Regulation on specialization ("Official Gazette of the RS", no. 11/2010) and Regulation on research and development ("Official Gazette of the RS", no. 11/2010) define the listed competition infringement forms as restrictions in terms of the content of agreement whose existence exclude the possibility of exemption of agreement from prohibition, that is, exercise of benefits envisaged by listed regulations. The Commission points that fraudulent, that is, rigged offers in public procurement procedures (bid rigging) represent the special form of restrictive agreements that are also characterized as extremely severe competition infringement.

Such position of legislator fully corresponds to the practice up so far of the Commission, practice of the European competition authorities, as well as positions of the legal and economic science. Specifically for cartels – horizontal agreements whose objective is price setting or limitation of production or sales, or division of sourcing market, the most severe sanctions are set by the competition authority, and they cannot fulfill conditions for exemption of agreements from prohibition envisaged by Article 11 of the Law.

When taking the position on possibilities of implementing Article 58 of the Law in the proceedings conducted before the Commission, this institution shall also take into consideration the commitment taken from Article 73(2) of the Stabilization and Association Agreement, according to which any practices contrary to mentioned article shall be assessed on the basis of criteria arising from implementation of competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 of the EC Treaty (currently 101, 102, 106, 107 of the Treaty on the Functioning of the EU), and interpretative instruments adopted by the Community institutions.

Stipulated in the preceding, the Commission also valued the circumstance that in accordance with the EU acquis, the institute of so called "Commitments" from Article 9 of the Regulation 1/2003 (OJ L 1, 04.01.2003, p. 1), that on the basis of its importance and objectives can be compared to the institute of adjournment of proceeding from Article 58 of the Law, is not implemented in the cases of severe competition infringements in terms of restrictive agreements of a cartel nature.

Proceeding from facts stated in Recital 13 of the quoted Regulation 1/2003, the European Commission's interpretation of this provision in the Memorandum EC – MEMO/04/217 from September 17, 2004, states that implementation of Article 9 of the Regulation is excluded in cases of establishment of infringements referring to secret cartels. In the same sense and meaning, Paragraph 116 of the European Commission's *Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 of TFEU* (2011/C 308/06), provides the following: "Commitment decision is not appropriate in cases where the Commission, considering the nature of infringement, intends to impose a fine". Consequently, the European Commission does not apply Article 9 of the Regulation 1/2003 to cases of secret cartels that fall under the European Commission's *Notice on immunity from fines and reduction of fines in cartel cases* (2006/C 298/11).

With regard to the above, the Commission assessed that application of Article 58 of the Law would not be appropriate in investigation procedures, of already mentioned, most severe competition infringements of cartel type, having in mind the nature, gravity and consequences which respective agreements have or may have on competition in the relevant market. For that reason, measure for protection of competition, in the form of commitment payment of monetary amount, constitutes the appropriate administrative measure determined by the decision of the Commission in proceedings in which the existence of the most severe competition infringements has been established.

In cases of existence of competition infringement in the form of restrictive agreements that pursuant to Article 10 of the Law are considered as cartel agreements, the undertakings may use benefits from provisions of Article 69 of the Law – Relief from the commitment from measure for protection of competition, as also foreseen in the beforehand mentioned European regulations (via the institute of leniency).
With respect to all above stated, concurrently considering provision of Article 58(5) of the Law, prescribing that the Commission shall not be held obliged to accept the proposal referred to in Paragraph 1 of the same Article, and consequently, neither the proposal for adjournment of proceeding, the Commission is of the opinion that:
Adjournment of proceeding, pursuant to provision of Article 58 of the Law, shall not be appropriate in proceedings investigating the most severe competition infringements whose objective is price setting or limitation of production or sales, or division of sourcing market, and thus, by default, proposals of commitments submitted by the party to proceeding of such type shall not be accepted.