APPLICATION OF ARTICLE 58 OF THE LAW ON PROTECTION OF COMPETITION

By modifying and amending the Law on Protection of Competition ("Official Journal of the RS" nos. 51/2009 and 95/2013, hereinafter:the Law), suspension of procedure based on proposal and commitments made by the party to procedure is introduced as one of the most significant novelty. The aim of the new legal solution laid out in Article 58 of the Law is to regulate more closely the institute of suspension of procedure, so that on the strength of relevant provisions Commission for Protection of Competition (hereinafter: Commission) may, within the procedure initiated for infringement of competition, approve commitments proposed by the party to procedure, the final aim being the elimination of possible infringement. This institute should, above all, be considered in the light of intention of legislator to contribute to cost-effective manner of procedure, without obligation of Commission to establish existance of infringement, along with simultaneous elimination of, for competition, disputable conditions on market in a more expedious and efficient way. Not the least important is the fact that this institute is also beneficial for market participant - party to procedure, enabling it to propose commitments for achievement of aim of remedy provided for in Article 59 of the Law (remedy for elimination of infringement of competition), without issuance of decision on infringement which would also imply determination of remedy for protection of competition.

Article 58, paragraph 1 of the Law prescribes that the Commission, upon its approval of the proposal of the party to procedure and conduct of actions referred to in Article 58, paragraph 3 of the Law, may issue a resolution on suspension of investigation of infringement of competition " determining the remedy provided in Article 59 of this Law", and specifying conditions and deadlines for execution of respective remedies.

Determination of remedy set in Article 59 of the Law, pursuant to mentioned provision, implies approval of proposed commitment, ordered by the decision on suspension of procedure to the party to procedure, which is, by its nature one of the remedies prescribed by Article 59 of the Law (behavioural or structural remedy).

Regardless the above stated, commitment ordered by the decision on suspension of procedure in any case has to satisfy the same objectives for which in the procedure for establishment of infringement of competition, and after infringement has been established, measures proportional to the gravity of infringement have been determined, pursuant to provision of Article 59, paragraph 2 of the Law.

Provision of Article 59, paragraph 1 of the Law, pursuant to application of Article 58 of the Law, generaly, as well as in any particular case, has as a consequence and aim to eliminate, on the basis of obligations ordered to be executed, any possibility of further existance of any reasonably assumed or future infringements of competition, i.e. prevention, distortion or restriction of competition. Each one of proposed commitments, as well as all commitments jointly, have to ensure achievement of objectives contained in Article 59 of the Law.

Behavioural remedies laid dawn in Article 59 of the Law, are aimed at elimination of established infringement of competition, i.e. prevention of possibe creation of the same or similar infringement, by issuing an order for taking appropriate action or prohibiting particular behaviour, whereas structural remedies are imposed only if there is no possibility

for determining equally or approximatively effective behavioural remedies or if determination of behavioural remedies would constitute greater burden for market participants than actual structural remedy, i.e. if the previously imposed behavioural remedy relating to the same infringement, has not been fully implemented.

In 2014 and 2015, Commission issued decisions on proposals for suspension of procedures in several cases, which, with one exception, referred to procedures for establishment of infringement as set in Article 10 of the Law, that is, to restrictive agreements made between competitors. In order to ensure legal certainity for market participants concerning application of said provision of the Law, Commission concluded that is is necessary for market participants to be informed of the position taken by it concerning application of Article 58 of the Law.

It should be noted that provisions of Article 58 of the Law, as well as of any other article of the Law, cannot be considered, assesssed and applied outside the context of other provisions of the Law and provisions of other regulations adopted on the strength of the Law. Article 10 of the Law defines restrictive agreements qualifying them as null and void, except in cases of exemption from prohibition as defined by the Law. Article 14 of the Law defines agreements of lesser importance which are permissible, except if the aim of horizontal agreements is price fixing or restriction of production and sale, i.e. sharing of market supply, as well as if the aim of vertical agreement is price fixing, i.e. market sharing. This provision clearly points to conclusion that the legislator identified said forms of infringements (price fixing, market sharing and market restriction) as the most serious competition infringements, confirmed by the fact that their existance constitutes competition infringement regardless of the level of market share of parties to agreement. Also, on the ground of provisions from Article 5 of the Regulation on Specialization ("Official Journal of the RS" no. 11/2010) and Regulation on Research and Development ("Official Journal of the RS" no11/2010), listed forms of infringement are defined as restrictions regarding the content of the agreement, the existence of which excludes the possibility of exemption of agreement from prohibition, i.e. enforcement of benefits prescibed by said Regulations. Commission points out that fraudulent bid riggings in public procurements represent specific form of restrictive agreements, which are also qualified as an exceptionaly grave competition infringement.

Such standpoint of legislator fully corresponds to the current practice of the Commission, practice of European competition authorities, as well as the ground taken by the science of law and economic science. Exactly for cartel agreements – horizontal agreements whose aim is price fixing, restriction of production or sale, that is, market sharing – competition authorities impose the most severe sanctions and such agreements cannot fall under conditions for exemption from prohibition, as provided by Article 11 of the Law.

Regarding the application of Article 58 of the Law in procedures conducted before it, Commission also considered the obligation taken over from Article 73, paragraph 2 of the Stabilization and Assession Agreement, according to which any practices contrary to stated Article, shall be assessed on the strength of criteria arising from the application of competition rules applied in EU, in particular from Articles 81, 82, 86 and 87 of the Treaty on European Community (presently 101, 102, 106, 107 of Treaty on the Functioning of the European Union), as well as interpretative instruments adopted by the Community institutions.

In line with the above stated, Commission also assessed the fact that pursuant to EU acquis communautaire, institute of a so called "commitments" referred to in Article 9 of the

Regulation 1/2003, which, according to its importance and objectives may be compared to institute of suspension of procedure as set in Article 58 of the Law, does not apply in cases of serious infringements of competition in the form of restrictive agreements – cartels.

Proceeding from the facts stated in recital 13 of the relevant Regulation 1/2003, the interpretation of this provision in Memorandum EC – MEMO/04/217 of 17.09.2004 by the European Commission is that the application of Article 9 of the Regulation is excluded in cases of establishment of infringements referring to secret cartels. In the same sense, paragraph 116 of the Commission Notice on the 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 considers that the nature of infringement calls for imposition of a fine. Consequently, European Commission does not apply Article 9 of Regulation 1/2003 to secret cartels that fall under the Notice on immunity from fines and reduction of fines in cartel cases" (2006/C 298/11).

With regard to the above, Commission assessed that the application of Article 58 of the Law would not be appropriate in investigation procedure, of already mentioned, most serious infringements of competition related to cartels, having in mind the nature, gravity and consequences which respective agreements have, or may have, to competition in relevent market. For that reason, remedy for protection of competition, in the form of fine, constitutes appropriate administrative measure determined by the decision of the Commission in procedures in which the existance of most serious infringements of competition has been established.

In cases of existence of infringements in the form of restrictive agreements which, pursuant to Article 10 of the Law, are considered as cartel agreements, market participants may apply benefits provided for in provisions of Article 69 of the Law – Relief from the obligation related to remedy for protection of competition, as laid down in previously mentioned European regulations (through leniency).

With respect to above stated, and considering provision of Article 58, paragraph 5 of the Law, prescribing that the Commission is not obliged to accept proposed obligations referred to in paragraph 1 of the same Article, and consequently, neither proposal for suspension of procedure, the Commission is of the opinion that:

Suspension of procedure, pursuant to provision of Article 58 of the Law, is not appropriate in procedures investigating most serious infringements of competition contained in Article 10 of the Law, having as an aim fixing of price or restriction of production or sale, i.e. sharing of supply market, thus, as a rule, in such cases proposal of commitments presented by the party to procedure shall not be approved.