



REPUBLIC OF SERBIA
COMMISSION FOR PROTECTION OF COMPETITION

Suspension of proceedings – Article 58 of LPC
step towards
Article 9. of Council Regulation No 1/2003

Sofia Competition Forum on Jun 10th 2016

Prepared by

Radojčić Čedomir

Head of Restrictive Practices Division

❖ Certain views expressed in this presentation are those of the author and may not necessarily reflect the views of the Commission for Protection of Competition

Legal framework 2005 - 2013 - Suspension of Proceedings

- ❑ The Law on Protection of Competition **from 2005** - contained provisions on suspension of proceedings - **Article 65** – „in case the competition has been restrained to insignificant extent, while the party to the procedure shall obligatory state not to continue or repeat and to compensate or eliminate any damage caused....“
- ❑ The Law on Protection of Competition **from 2009** - contained a provision on the suspension of the proceedings - **Article 58**
 - ✓ If a negligible infringement of competition is established, the Commission may pass a resolution on suspension of procedure initiated ex officio, and the party has to commit itself not to continue or repeat the act that substantially restricts, distorts or prevents competition, i.e. that it shall compensate or eliminate any damage caused.
 - ✓ Suspension of procedure may not exceed six months.
 - ✓ The Commission shall supervise ex officio the acting under commitment
 - ✓ If a party against which a procedure is conducted does not comply with or breaks its commitments prior to the expiry of the period of six months or in the meantime performs another act of infringement, the Commission shall continue the procedure.
 - ✓ Resolution on suspension i.e. continuation of procedure is passed by the President of the Commission.

Legal framework 2013- Suspension of Proceedings

- **Amendments to the Law on Protection of Competition of 2013** brought changes in approach at the suspension of the proceedings - a step towards harmonization with Article 9 of Council Regulation 1/2003 - (Commitments)
- **Article 58** - still entitled Suspension of proceedings
 - Commission may pass a decision on suspension of the proceedings of competition infringement investigation, determining a measure prescribed in Article 59 of the Law, if the party to the procedure, based on the content of decision on initiation of proceedings, or the facts established in the proceedings, submits a proposal of commitments that is willing to voluntarily undertake in order to eliminate possible infringements of competition, along with conditions and deadlines for the implementation of respective measure.
 - The party may submit the proposal the latest prior to receipt of the notification referred to in Article 38,
 - **Notice on submission of the party's proposal**, which contains a brief description of the proposal and the essential elements of the case, shall be published by the Commission on its website, along with an invitation to all interested parties to submit written remarks, views and opinions within 20 days from the date of publication of this notice (**market test**)

Legal framework 2013- Suspension of Proceedings (2)

- The proceedings **will continue (resume) within the period not longer than three years** from the date of passing of the resolution referred to in paragraph 1 of this Article, if:
 - Substantial changes of circumstances, upon which the resolution on suspension of proceedings was based, occur;
 - The party fails to fulfill the commitments determined by the measure within the time limit for fulfillment, or does not provide adequate evidence to that effect;
 - The Commission finds that the resolution on suspension of proceedings was grounded on inaccurate, false, incomplete or misleading information provided by the party.
- **Resolution on suspension of proceedings, or on resuming of proceedings shall be passed by the Council.**
- **Commission shall supervise ex officio whether acting of the party is in compliance with the resolution on suspension of proceedings**
- ❑ **The Commission is not obliged to accept the proposal for suspension of proceedings**

Opinion and viewpoint of the Commission on the application of Article 58 of LPC

- While taking a stand on the possibilities of application of Article 58 of the Law, the Commission took into account the obligation assumed by **Article 73, paragraph 2 of the Stabilisation and Association Agreement**, according to which any practices contrary to the said Article, must be evaluated on the basis of criteria arising from the application of the rules on competition policy to be applied in the EU, in particular from Articles 81, 82, 86 and 87 of the Treaty on European Union (now 101, 102, 106, 107 of the TFEU), and interpretative instruments adopted by the Community institutions.
- For the purposes of the foregoing, the Commission took into account the fact that in accordance with the EU acquis, the institute called "**Commitments**" under **Article 9** of Council Regulation **No1/2003** (OJ L 1, 04.01.2003, p. 1), meaning and objectives of which can be compared with the suspension of the proceedings under Article 58 of LPC, shall not apply in cases of serious infringement of competition in the form of restrictive agreements (cartels and other agreements of a cartel nature).

❖ **The Commission took the stance:**

Suspension of proceedings, pursuant to Article 58 of the Law, is not appropriate in proceedings concerning serious infringements of competition under Article 10 of the Law, related to price fixing or limiting of the production or sale, or allocation of the sources of supply, and, as a rule, in such proceedings Commission will not accept proposals of commitments submitted by the party to the proceedings.

Application of Article 58 - suspension of proceedings in practice of the Commission

Commission vs „Telekom Serbia“ SC

Summary of the Case

- ❑ The Commission for Protection of Competition (CPC) has acted after submission of Initiatives for allegedly infringement of Article 16 of the Law (abuse of dominant position)
- ❑ President of the Commission passed a decision on initiation of proceedings, ex officio, against the company "Telekom Serbia,,

❑ Relevant markets on which the Commission conducted an investigation concerning alleged infringement of competition:

- Wholesale of ADSL broadband Internet access by using copper wires on the territory of the Republic of Serbia
- wholesale of services of direct access to the Internet for international networking on the territory of the Republic of Serbia
- The Commission has taken into account the fact that the company "Telekom Serbia" is vertically integrated and active participant in the wholesale and retail market of the Internet services, and that in certain cases has provided wholesale services to operators who are its competitors on the retail market, at prices that were higher, or at the same level, comparing to prices which were charged at retail for end users of Telekom Serbia.

Commission vs "Telekom Serbia" SC (2)

- ❑ In the proceedings before the Commission, following infringements of the competition were investigated:
 - margin squeeze
 - The application of dissimilar conditions to equivalent transactions with other trading parties (price discrimination)
 - Binding of service of wholesale of ADSL broadband Internet access, by granting a discounts for those internet providers for which "Telekom Serbia" is the only supplier of services of direct Internet access, at the wholesale level.
 - Granting of a discount of 40% for the service of direct Internet access for international networking, for each increase of a flow, which was conditioned with automatic extension of validity of contracts for the next three years

- ❑ For the purpose of examination of existence of infringement of "margin squeeze" during the period relevant for the proceedings before the Commission, having in mind two possible tests: "Equally efficient operator - EEO" and "Reasonably efficient operator - REO", the Commission has opted for the application of the test "Equally efficient operator - EEO"

Commission vs "Telekom Serbia" SC (3)

- ❑ Application of EEO test was in accordance with European practices. The same test was also used by the European Commission in the case of Telefónica and Deutsche Telekom (Case COMP / 38.784 - Wanadoo España vs. Telefónica and Case COMP / C-1 / 37.451, 37.578, 37.579 - Deutsche Telekom AG) - both cases were confirmed before the European Court of Justice (case C-295 / 12p and case C-280/08 P).
- ❑ Company "Telekom Serbia", on August 7th 2014, submitted a proposal of commitments that is willing to voluntarily undertake in order to eliminate possible infringements of competition, along with conditions and deadlines for the implementation of proposed measure.

➤ MARKET TEST

- Notice on submission of the party's proposal, with a brief description of the proposal and the essential elements of the case, was published by the Commission on its website, along with an invitation to all interested parties to submit written remarks, views and opinions within 20 days from the date of publication of the notice.

Commission vs "Telekom Serbia" SC (4)

- ❑ The Council of the Commission found that, with proposed commitments, the objectives of measures referred to in Article 59 of the Law could be achieved, assessing that the commitments would enable effective competition in the relevant market, and that the commitments, concerning content and effects, correspond to the measures which could be imposed if alleged infringement of the Competition would be proven as truth in proceedings.
- Resolution on suspension of proceedings was passed on November 14th 2014.
- ❑ In accordance with the proposal of commitments and results of the market test, by resolution on suspension of proceedings, and within the period of 2 years, "Telekom Serbia" **was obliged:**
 - ✓ to apply the EEO test when determining a proposals for new prices, or for changes in existing prices on the retail market of services of ADSL broadband Internet access over copper wires, which is vertically integrated with the market of wholesale of ADSL services of broadband Internet access,
 - ✓ to not introduce new, nor to modify the existing, retail prices of services of ADSL broadband Internet access which would be lower than the costs, including a reasonable rate of profit, calculated in accordance with the EEO test;
 - ✓ that the relationship between the unit price for direct Internet access and of leased flow, which applies to its customers in the wholesale market, also applies to the calculation of the cost of direct access to Internet in its own retail;
 - ✓ to not introduce discounts for the services of wholesale of ADSL broadband Internet access, which would be conditioned by the simultaneous purchase of direct internet access in the wholesale market;
- "Telekom Serbia" **has an obligation to submit periodic reports on the fulfillment of the commitments every six (6) months**

Application of Article 58 - suspension of proceedings in practice of the Commission

Commission vs. „SERBIAN RAILWAYS“ SC (Access to rail infrastructure)

Summary of the Case

- The infringement procedure was initiated ex officio after the Commission reasonably presumed that the company Serbian Railways, has disabled access to - and use of railway infrastructure for other companies interested in performing transport of goods by rail.
- (22.10. – 07.12.2015) Party to the procedure, based on the content of resolution on initiation of proceedings, and facts determined in proceedings, has submitted a proposal of commitments that is willing to voluntarily undertake in order to eliminate possible infringements of competition, along with conditions and deadlines for the implementation of proposed measure.
- Market test was conducted in the period from 18.12.2015. to 15.01.2016.
- (19.01.2016.) The Council of the Commission has passed a decision on suspension of the proceedings of the investigation concerning infringement of competition, and has set out the obligations and deadlines for the execution of obligations in accordance with proposal.

Commission vs. „SERBIAN RAILWAYS“ SC (2)

- ❑ According to the proposal, and after conducting a market test - the party is obligated to:
 - ✓ draft the Program of operations for 2016 and submit it to the competent ministry to obtain the consent of the Government of the Republic of Serbia;
 - ✓ draft the Program of maintenance of the railway infrastructure, of organization and regulation of rail transport, as well as for construction and reconstruction of railway infrastructure;
 - ✓ pass a Decision on determining the amount of fees for the use of railway infrastructure within 15 days of the conclusion of the Agreement, with the Government of the Republic Serbia, regulating mutual rights and obligations in terms of financing rail infrastructure management costs in the part that makes the difference between the actual costs of managing of the railway infrastructure and the revenue generated from infrastructure charges and the charged prices of services;
 - ✓ adopt a model of contract on the use of railway infrastructure - within 15 days of the adoption of the act on the elements of the contract on use of rail infrastructure by the relevant minister, in accordance with Article 17 of the Law on Railways;
 - ✓ to prepare a draft of timetable relating to international traffic, not later than eleven months, or for national traffic, not later than six months prior to the effective date of new timetable;

Commission vs. „SERBIAN RAILWAYS“ SC (3)

..... the party is obligated to:

- ✓ to adopt a methodology on evaluation of criteria for the award of the route of the train, within 15 days of the conclusion of the Agreement regulating mutual rights and obligations with the Government of the Republic of Serbia;
 - ✓ to adopt a Statement on the network within 15 days of fulfillment of all following conditions:
 - the signing of the Treaty governing the mutual rights and obligations with the Government of the Republic of Serbia,
 - obtaining the consent of the Government of the Republic of Serbia on the methodology on evaluation of criteria for the award of the route of the train
 - obtaining the consent of the Government of the Republic of Serbia to the Decision on determining the amount of fees for the use of railway infrastructure and
 - adoption of a model of contract on the use of railway infrastructure
 - ✓ to start with "selling of the routes" to all undertakings which meet the statutory requirements for access to the public railway infrastructure - after the publication of the Statement on the network;
- The undertaking was ordered that, until 31.12.2018, to the Commission for Protection of Competition, regularly submits **periodic reports on fulfillment of obligations**:
- ✓ by 15. of July of the current year the report covering the period January-June of the current year,
 - ✓ by 15. of January of the current year the report covering the period July-December of the previous year,

Article 58. LPC – Article 9. Regulation No 1/2003 Same or similar?

Article 58. of LPC

- Initial assessment – insufficiently defined in the Law - investigative instruments may be used to the full extent only after the decision on initiation of proceedings
- The proposal can only give a party to the proceedings (investigative procedure is initiated)
- The proposal is possible in the period from receipt of the decision on initiation of proceedings to the receipt of the notification referred to in Article 38 (SO)
- The Law does not stipulate on which infringements of competition should/could be applied Article 58
- The proposed commitments must meet the purpose and objective of the measures under Article 59 of LPC (behavioral measures and structural measures)
- The party is not required to confess the infringement of competition
- The Commission conducts market test

Article 9. of Regulation No1/2003

- Investigative instruments may be used to the full extent since the beginning and immediately after the filing of Complaints
- The proposal can be submitted by undertakings concerned
- The proposal may be submitted after the preliminary assessment of the Commission (less detailed than the SO) or after SO
- Market test must be conducted
- Recital 13. – Commitment decisions are not appropriate in cases where the Commission intends to impose a fine
- Decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission

Article 58. LPC – Article 9. Regulation No 1/2003 Same or similar? (2)

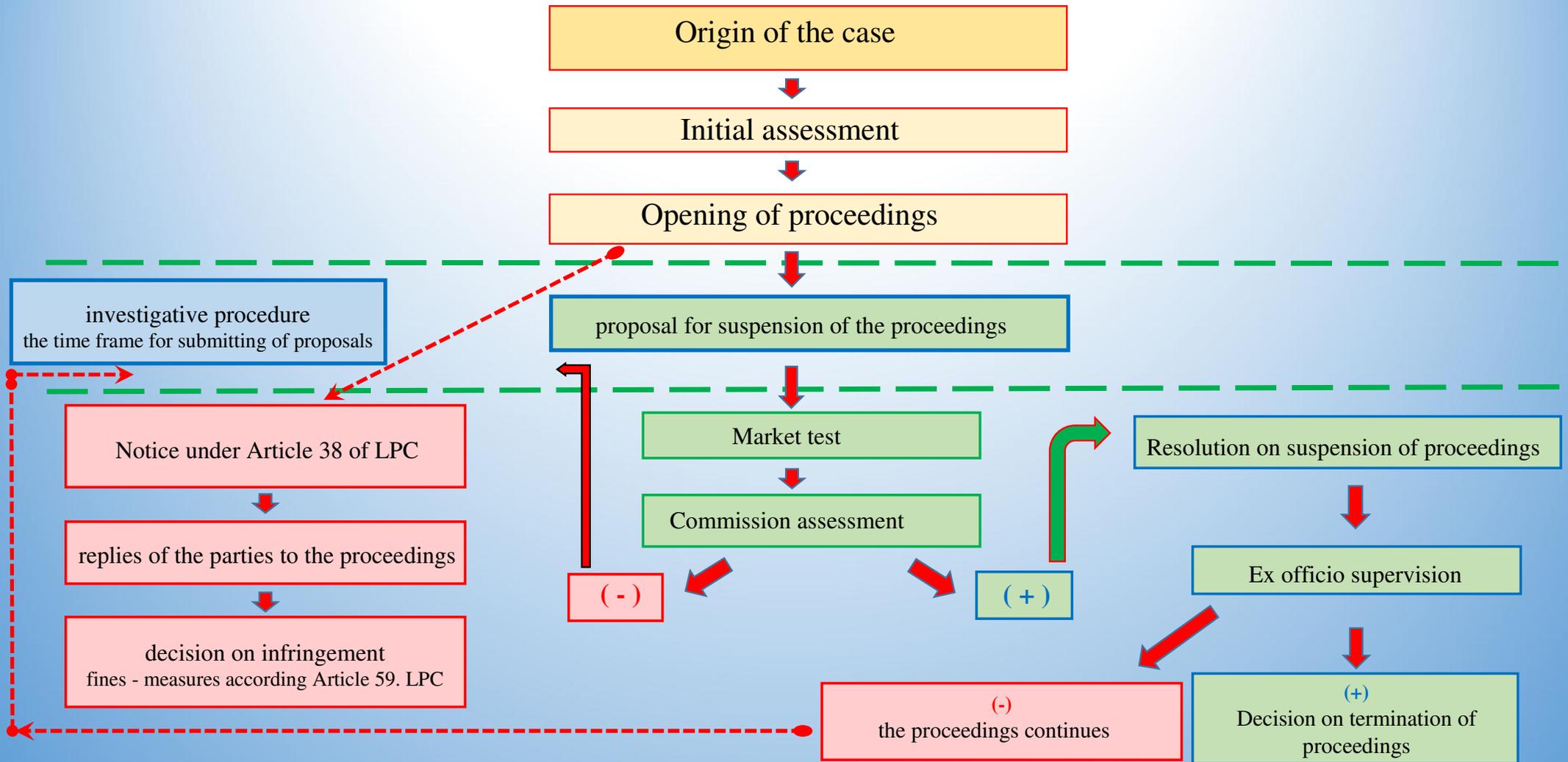
Article 58. of LPC

- The deadline for submission of written comments, views and opinions is 20 days from publication of the notice on the website of the Commission
- The Commission is not obliged to accept the proposal of commitments
- The Commission estimates remarks, views and opinions gathered during the market test - but is not obliged to accept them
- Measures, that are binding for the party in the procedure, and deadlines for the implementation of the measures, are determined by Resolution on suspension of the proceedings
- The Commission will not establish existence of infringement of competition
- If the conditions required by law are met - the proceedings can be continued within a period of 3 years
- Commission ex officio supervise the implementation of imposed measures

Article 9. of Regulation No1/2003

- The Commission may reopen the proceedings – upon request or on its own initiative
- The conditions for the reopening of the proceedings - almost identical to the conditions of Article 58 LPC

Article 58. of LPC – a roadmap



Thank you for your attention!

Commission for Protection of Competition

Belgrade, Savska 25/IV

www.kzk.gov.rs