Implementation of Article 10 of the Law on Protection of Competition in the Case of Affiliated Undertakings in the Public Procurement Procedures

The Public Procurement Law ("The Official Gazette of the RS", no. 124/2012, 14/2015 and 68/2015) prescribes **obligation to notify on competition infringement** (Article 27 of the Public Procurement Law) in the case of reasonable doubt in the veracity of **declaration of independent bid**. Pursuant to Article 26, Paragraph 2 of the mentioned law, in the declaration of independent bid, bidder confirms under full financial and criminal responsibility that the bid was submitted independently, without any agreement with other bidders or interested parties.
In the previous period, in accordance with the above-mentioned provisions of the Public Procurement Law, the Commission for Protection of Competition (hereinafter: the Commission) received initiatives for initiation of competition infringements proceedings related to bid rigging in public procurements, submitted by contracting authority independently, or in accordance with the order from decision issued by the from Republic Commission for the Protection of Rights in Public Procurement Procedures. Initiatives in question are investigated in accordance with the provisions of the Law on Protection of Competition ("The Official Gazette of the RS", no. 51/09 and 95/13, hereinafter: the Law) related to restrictive arrangements, having in mind that mentioned infringement of competition – *the bid rigging*, in national and foreign practice is considered as a particular form of restrictive agreement between undertakings – the competitors on requirements for participation in public procurement procedures.

A certain number of initiatives is related to the assumed competition infringement performed by multiple bidders that are considered to be affiliated undertakings pursuant to the provisions of the Law. Namely, pursuant to Article 5, Paragraph 1 of the Law, affiliated undertakings are two or more undertakings that are affiliated in a way that one or more undertakings are **in control** of the other undertaking or undertakings. Pursuant to Paragraph 2 of the mentioned article[1], affiliated undertakings are considered to be **a single undertaking**. In accordance with the mentioned, an agreement on requirements for participation in public procurement procedure between affiliated undertakings, based on legal definition of restrictive agreement, **would not constitute a competition infringement pursuant to Article 10 of the Law on Protection of Competition** because restrictive agreement, pursuant to Article 10, Paragraph 1 of the Law, constitutes "an agreements between undertakings…" and in accordance with that, can be concluded exclusively between **independent undertakings**.

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[1] Article 5. Paragraph 2. - Control over an undertaking, in accordance with this Law, represents the possibility of decisive influence on managing activities of another undertaking or other undertakings, in particular:

1) if the controlling undertaking, solely or acting jointly with another undertaking, has the characteristic of a controlling (parent) company, and/or controlling party or shareholder, in line with rules pertaining to affiliated companies, as stipulated by the Law on Companies
2) on the basis of ownership or other property rights over a property or part of the property of another undertaking;
3) on the basis of rights deriving from a contract, an agreement or securities;
4) on account of receivables, security instruments or terms of a particular business practice determined by the controlling undertaking.

Previously mentioned is harmonized with the European Union Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union (hereinafter: the TFEU) to horizontal co-operation agreements, stating that companies that form part of the "same" undertaking, i.e. the same "group" of undertakings pursuant to Article 101 are not considered to be competitors for the purposes of this Guidelines[2]. Thus, Article 101 of the TFEU is only implemented on agreements between independent undertakings, as stipulated by Article 10 as well, related to the implementation of Article 5 of the Law on Protection of Competition.

In order to establish a future practice, and with the goal of enabling a higher level of legal security, the Commission presents the view of not taking into consideration initiatives pointing to competition infringement pursuant to Article 10 of the Law on Protection of Competition in public procurement procedures (bid rigging), when the assumption is solely expressed in terms of autonomy of bids submitted by affiliated undertakings, i.e. bidders, pursuant to Article 5 of the Law, regardless of the circumstance of signing of a statement on independent bid as an integral part of tender documentation.

The Commission points that it does not consider as a necessity to prevent or limit the possibility for affiliated undertakings' independent participation in certain public procurement procedure, nor to prejudge that statements on the independent bid, signed in those cases, are not valid. In such situations, the contracting authority is obliged to diligently analyze bidder's bids and activities, in order for public procurement procedure to be fully conducted in accordance with the Public Procurement Law and prescribed principles. If affiliated parties have signed a statement on independent bid, and contracting authority suspects on the veracity of statement on independent bid based on the content of the bid and activities of those bidders, it is necessary to additionally investigate bids and/or utilize other possibilities as well, but in accordance with the provisions of the Public Procurement Law.

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[2] "Companies that form part of the same 'undertaking' within the meaning of Article 101(1) are not considered to be competitors for the purposes of these guidelines. Article 101 only applies to agreements between independent undertakings. When a company exercises decisive influence over another company they form a single economic entity and, hence, are part of the same undertaking. (8) The same is true for sister companies, that is to say, companies over which decisive influence is exercised by the same parent company. They are consequently not considered to be competitors even if they are both active on the same relevant product and geographic markets."