

Enforcement of competition rules in Croatia – challenges and the way forward

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1. Introduction

The intention of this paper is to present selected issues which relate to the application of competition rules in Croatia, in particular in light of the quasi-direct application of EC competition rules prior to membership of Croatia in the EU. After twelve years of experience in enforcement of competition rules we see an established system in terms of legislative and institutional framework. However there is still some of room for improvement both in terms of legislative change and in terms of a more effective and aggressive enforcement by the competent authorities. Main characteristics of the way competition rules are applied in Croatia will be presented, and some challenges for the future will be identified.

2. Stabilisation and Association Agreement and the application of EC competition rules

Enforcement of competition rules in Croatia started in 1997 when the Competition Agency² was first established pursuant to the Competition Act of 1995.³ Although the first Competition Act (1995) was already drafted under the influence of EC and US competition law, it was the Stabilisation and Association Agreement (hereinafter: SAA) signed between Croatia and EU in 2001 that introduced a formal obligation for Croatia to harmonize its domestic legislation with the *acquis* (Article 69 SAA).⁴ The process of *rapprochement* to the EU was no doubt an incentive to harmonise further and in 2003 a new Competition Act was adopted.⁵

Apart from Article 69 SAA which provided for harmonisation of domestic legislation, the SAA contained another important provision that allowed for EC competition rules to be applied by the competition authority in Croatia with a quasi-direct effect: pursuant to Article 70 SAA in cases relating to restrictive agreements and abuse of dominant position (as well as state aid), and if there is an effect on trade between Croatia and Community, criteria arising from the application of Community competition rules must be applied. This meant that Articles 81 and 82, as well as secondary legislation, but also case-law and soft law had to be taken into account in such cases.⁶ Unlike Europe Agreements, which also contained a similar provision, no implementing rules had to be adopted to this effect.

It is important to note though, that the Competition Agency not only uses Article 70 SAA to apply EC competition rules in cases where cross-border trade could be affected but it applies those rules indiscriminately, and the analysis of a potential or actual effect on trade for the purpose of application of Article 70 SAA is not carried out. This means that in effect, prior to Croatia's

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³ Official Gazette (Narodne novine) 48/95, 52/97, 89/98.

⁴ Act on ratification of the Stabilisation and Association Agreement between the Republic of Croatia, of the one part, and the European Communities and their Member States, of the other part (*Zakon o potvrđivanju Sporazuma o stabilizaciji i pridruživanju između Republike Hrvatske i Europskih zajednica i njihovih država članica*), Official Gazette – International Agreements (Narodne novine-Međunarodni ugovori), 14/2001.

⁵ Official Gazette (Narodne novine) 122/2003.

⁶ Article 70 (2) SAA provides for application of “criteria arising from the application of the competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 of the Treaty establishing the European Community and interpretative instruments adopted by the Community institutions”.

membership in the EU, the Competition Agency acts as if Croatia is a full member and applies fully EC competition rules, especially in cases where there is a lacuna in domestic legislation or there is a helpful case-law point that is useful for interpreting the aim of the rules applied in a concrete case. For example, in merger cases the decisions of the Competition Agency regularly mention Regulation 139/2004 and relevant guidelines as pieces of EC legislation which were used as a source of law in a concrete case.

In this respect a question arose whether EC competition rules were to be regarded as a direct source of law, i.e. if Article 70 SAA had direct effect. As already mentioned it has been a well-established practice of the Competition Agency to apply criteria arising from EC competition law in cases where no relevant Croatian legislation existed but also as supportive rules showing more clearly the aim of substantive rules themselves. The Administrative Court of the Republic of Croatia, which exercises judicial control over decisions of the Competition Agency, supported the application of EC competition rules pursuant to Article 70 SAA, but it recently held that no EC competition rules are to be directly applicable as a source of law unless they have been properly incorporated into the Croatian domestic legislation.⁷ This was a restrictive interpretation of the SAA which meant that if EC rules were to be applied in a case decided by the Competition Agency they first had to become part of domestic legislation.

However, this issue has now been settled by the Constitutional Court of the Republic of Croatia which held that this restrictive position is not valid since EC competition rules were not to be applied as a primary source of law, but merely as an auxiliary means of legal interpretation.⁸ It also held that Article 70 SAA had to be viewed in the context of Croatia's obligation to harmonise its legislation, including competition legislation, with the *acquis*. The Court also held that the harmonised legislation is to be applied in accordance with the meaning and the spirit of the *acquis*. This Constitutional Court decision is a landmark ruling on the application of EC competition rules in Croatia pursuant to Article 70 SAA.

Another important issue was cleared by the Constitutional Court in this case. The question arose whether EC competition rules could be applied to unilateral practice (refusal to deal) that was consumed prior to the coming into force of the SAA, i.e. prior to the conclusion of the Interim Agreement. In this respect the Constitutional Court held that the EC rules were correctly applied by the Competition Agency in that case because the aim of the above mentioned international agreements was “to eliminate from the market any contract or relationship that impedes free competition”.⁹

3. Competition Act 2010

Certain room for improvement of the existing legislative framework was spotted in the course of application of Competition Act 2003. In particular, it was becoming obvious that the inability of the Competition Agency to directly fine undertakings for breach of competition rules lead to crippling the Competition Agency's authority. Moreover, the idea started arising that fight against cartels had to be set as a priority and the absence of the appropriate leniency programme was named as one of the main reasons of insufficient efforts of the Competition Agency in this direction. In 2009 a new Competition Act was adopted by the Croatian Parliament which brings substantive changes to the existing

⁷ Us-5438/2003, 26.10.2006, Official Gazette (Narodne novine) 16/2007.

⁸ U-III-1410/2007, 13.02.2008, Official Gazette (Narodne novine) 25/2008. Previous incorporation of EC competition rules into the domestic legal rules is not necessary since the *acquis* is not applied as a “primary source of law, but merely as an auxiliary means of legal interpretation”.

⁹ U-III-1410/2007, 13.02.2008, Official Gazette (Narodne novine) 25/2008.

legislative framework.¹⁰ The new Competition Act brings about a welcome improvement of the existing black-letter rules aligning them more thoroughly with the *acquis*.

The new Act will enter into force on October 1, 2010. As already mentioned the most important feature of the new Act is that it introduces the possibility of leniency and gives the power to the Competition Agency to directly fine undertakings for breach of competition rules. Also, the new Act brings significant changes to the procedural rules which were closely modelled on Regulation 1/2003.¹¹

Although the Competition Agency, originally established in 1997, adopted more than 100 decisions between 2004 and 2008, the effectiveness of enforcement has been suffering already from its inception. Both pursuant to Competition Act 2003 and to the previous Competition Act 1995 the Agency had no power to pronounce fines. Instead, it had to rely on locally competent misdemeanours court to act on its request and levy fines to undertakings against which the Agency adopted an infringement decision. At the same time the legality of the decision of the Agency was controlled by the Administrative Court of the Republic of Croatia. A great number of locally competent misdemeanours court decided to postpone its decision on fine until the Administrative Court adjudicated. In the majority of cases this meant years and years before the fine was finally levied and frequently the period of prescription would have lapsed. In addition, it was not unusual for misdemeanours court to generously apply the general rule of criminal law on reduction of fines, and distorting thereby the efficient prosecution of undertakings that breach competition rules. It is not difficult to see why the powers of the Agency had to be increased to encompass not only the power to adopt infringement decisions but also the power to pronounce fines. The Agency will now have the power to adopt a joint decision on substance and on fine, and the locally competent misdemeanours courts lose their role in the whole process. However, the Administrative Court remains competent to decide on the legality of the Agency's decision but now both on its substance and on the fine.

As regards substantive rules in the new Competition Act the number of changes is smaller than in the procedural part of the new Act but not necessarily of lesser importance. In the General Part of the new Act the notion of a single economic unit is explicitly introduced; the notion of an undertaking is more precisely defined; and a short definition of the relevant product and geographic market is now provided in the Competition Act. In the part of the Act that deals with restrictive agreements the provision on individual exemption has been deleted; it is now explicitly stipulated that the burden of proof is on the undertaking claiming that criteria for exemption of the agreement have been satisfied; and there is a new provision explaining what the notion of agreement might encompass.

The new Act downplays the dependability on market shares for defining collective dominance that was present in Competition Act 2003 and defines collective dominance as a situation where two or more undertakings act together in relation to their competitors and/or suppliers and/or consumers on a certain market. As regards single dominance, it is now presumed that dominance exists where an undertaking has the power to behave to an appreciable extent independently of its competitors, suppliers, customers and consumers, and the 40% relevant market benchmark is no longer used as a presumption of dominant position. Also, it is now explicitly stipulated that the Agency may order behavioural or structural remedies, with the preference being given to behavioural remedies and structural remedies only as a last resort solution.

There is a number of important changes in the part of the Act dealing with merger control: the SIEC-test will replace the dominance test; the possibility to have a simplified merger procedure is introduced; the threshold criteria have been somewhat changed in a sense that an additional condition

¹⁰ Official Gazette (Narodne novine) 79/09. The long announced new Competition Act was adopted by the Croatian Parliament on June 24, 2009.

¹¹ OJ L 1, 04.01.2003, p. 1-25.

has been added in order for the notification to be obligatory: at least one of the parties to the concentration has to have its seat and/or a branch in the Republic of Croatia (this will leave out the foreign-to-foreign mergers which seem to be at odds with the effects doctrine embraced by the Competition Act); the definition of the notion of concentration is now more clearly dependent on the notion of a lasting change in control.

The part of the Competition Act dealing with procedural rules has gone through a major overhaul: a person who gives initiative for the commencement of proceedings before the Agency no longer acquires the status of a party – it will be solely the Agency who initiates the proceedings *ex officio*; the statement of objections is being introduced with the intention to ensure the right of defence; the notion of professional privilege is explicitly regulated in the Act for the first time; the possibility of leniency is introduced for the first time (a more detailed regulation has to be subsequently adopted by the Government before any leniency can be granted by the Agency); the criteria on calculating fine are regulated by the Act (a more detailed regulation has to be subsequently adopted by the Government); the possibility of commitments is introduced for the first time; the investigative powers of the Agency have been broadened: dawn raids are made possible by explicit and detailed rules stipulated in the new Act.

4. Enforcement record of the Competition Agency

There seems to be a qualitative leap in the decisional practice of the Agency after the adoption of the 2003 Competition Act: decisions now regularly contain reference to EC competition rules, analysis of the underlying competition issues is more detailed and engaging. However, it seems that a chance is not yet fully used to focus on “big” cases which would grasp attention of the media, have sufficient deterrent effect and contribute to improving the overall competition culture. Instead the attention of the Agency focused previously only on antitrust and merger control cases has been diluted by new powers granted to the Agency to control state aid. Moreover, it seems that the Agency is “fighting on several fronts” and has not been disciplined enough to focus on priorities.

The Agency invests lots of efforts in the area of competition advocacy: it gives its opinion on a great number of bills that go through legislative procedure; it gives its opinion to existing legislation that seems to have anticompetitive effects; it warns undertakings publicly of their possible involvement in breaches of competition rules. Its “advisory” role is quite high profile. However, this does not always translate to actual proceedings opened against undertakings that were warned of their anticompetitive behaviour.

Moreover, it seems that time is being lost on focusing on sectors which have only recently been put under investigation by the European Commission (professions: lawyers, auditors etc.). It is not that these sectors are deficient of competition issues. However, instead of tackling somewhat complex issues in that sector it seems that it would be of more use to consumers to focus on hard-core cartels where the doctrine and case-law are more straight-forward.

This diffusion of enforcement interests of the Agency with a focus on (soft) competition advocacy has the effect that a relatively small number of substantive decisions is being adopted annually. The first observation is that the number of substantive decisions relating to restrictive agreements and abuse of dominant position is significantly smaller when compared to the number of merger decisions. One reason for this might be that in merger control cases it is the parties to the concentration that must notify their concentration to the Agency, and as a rule no *ex officio* investigation must be conducted by the Agency prior to notification. The notifying parties are by law obliged to submit any document relevant for assessing the merger.¹² On the other hand, as regards

¹² Article 25 para 3 Competition Act 2003.

restrictive agreements, especially cartels, and abuse of dominant position the burden to prove breach of competition rules is on the Agency, and it is the Agency which must open proceedings *ex officio*. This means that certain investigative measures must be conducted by the Agency prior to opening proceedings and that sufficient indicia must be collected to support further action. Clearly the position of the Agency is more comfortable in case of merger control – once undertakings are sufficiently aware of their obligation to notify the cases come to the Agency themselves. On the other hand, in more complex merger cases it is not unobvious that the Agency must put a lot of effort in assessing their effects on competition. However, in circumstances where human resources are deficient the *ex officio* activity of the Agency may be muted. A more apparent reason for a high number of merger decisions is that a significant proportion of these cases were those decided by the Agency pursuant to the Media Act and the Electronic Media Act.¹³

In the year 2008, the last reporting period, four substantive decisions in the area of restrictive agreements were adopted by the Agency (three decisions concerning vertical agreements and one concerning horizontal cooperation agreement). In six cases the proposal for opening the proceedings was dismissed. In the area of abuse of dominant position three decisions were adopted (in two cases the abuse was found, and in one case the abuse was not found to exist). In 21 cases the Agency dismissed the motion for institution of proceedings. In the area of merger control 28 decisions were adopted by the Agency in 2008: 27 decisions in the phase I and one decision in phase II (conditional clearance). The markets concerned related to media and retail industry. In fact more than half of the decisions related to the media industry because of the wide reaching notification obligation in the media sector pursuant to the Media Act and Electronic Media Act. In four cases the Agency dismissed the motion for institution of proceedings.

5. Policy messages

In recent years competition policy priorities are being more and more clearly defined by the Competition Agency. A clear policy message was sent by the Chairman of the Croatian Competition Council Ms. Olgica Spevec in the foreword to the 2008 Annual Report.¹⁴ Pointing out to the fact that the very much needed increase in the number of employees of the Agency in face of the current crisis is not an option, she noted that the aim is to increase efficiency of the Agency. The key task was to focus on the most serious infringements of competition rules and on cases where the effect of its intervention will be measureable and visible. Clearly putting emphasis on the welfare of consumers and their right to lower prices, higher quality and more choice Ms. Spevec got her priorities straight. She warned undertakings not to enter into restrictive agreements such as price-fixing agreements, or abuse of dominant position such as unfair increase or decrease of prices with the aim to squeeze out competitors, as these are considered the most serious infringements of competition rules. However, she said that the Agency would not act where it had no competence, despite some pressure during 2008 on the Agency to act in face of the wave of increase in prices of communal services and food.

Indeed, the Competition Agency has at times been under a lot of pressure to react. In some cases this has been unjustified from the point of law: in 2006 in an alleged merger case threshold criteria were not satisfied and this triggered no notification obligation (T-HT/IskonInternet) although this was a situation where an incumbent and ex-monopolist took over a small but very successful firm (maverick). However, in some cases the Agency rightfully reacted but only through press releases, with no final decision adopted: in 2007 when a bakery products industry association announced a joint increase in prices the Agency was quick to publicly denounce this as a cartel agreement, but no

¹³ Media Act (Official Gazette 59/04) and Electronic Media Act (Official Gazette 122/03, 79/07, 32/08).

¹⁴ Annual Report 2008, www.aztn.hr.

decision has been adopted. It is interesting that the association in their reaction said that they did not have a dominant position on the market and that there was no breach of competition rules. This is illustrative for the state of awareness and knowledge of competition rules of individual undertakings or their associations at this stage of development of competition culture.

6. Conclusion

Since Competition Act 2003 was adopted a clear progress is visible in terms of the development of Croatian competition law and policy and this seems to be commensurate with the rapprochement to the EU. While Competition Act 2003 opened up a new era of competition law enforcement, Competition Act 2010 will ensure a more lasting legislative framework.

There is no denying that the legislative and institutional framework are building stones of a coherent competition policy, but not until enforcement record is solid can we talk of a well-established system of competition rules and a thriving competition culture. A challenge for the future is definitely strengthening the enforcement record in the area of cartels. This has been correctly recognised by the Agency as one of the priorities for the future.

Not until undertakings are heavily fined can the system function properly. In a recent discussion at the Croatian Parliament when the 2008 Competition Agency Report was presented it was explicitly suggested by a member of the Parliament from the ruling coalition that undertakings should be “afraid” of the Competition Agency and that the Agency must not be seen as an advisory body. Indeed, suggesting to undertakings that they have breached competition rules but not adopting substantive decisions seems not to be a sufficient deterrent for firms continuously involved in hard-core infringements.

Frustrated by the absence of an effective fining system the Agency seems to have put on hold its fight against cartels until the new Competition Act enters into force in 2010. Moreover, restrained by its interpretation of investigative powers pursuant to Competition Act 2003 (as not being precisely defined) the Agency is reluctant to open up “big” cases. But by now it is not only the Agency that is being frustrated. The whole Parliament is now forcefully demanding a full-blown attack on anticompetitive behaviour recognising that an overall higher level of prices in Croatia in comparison with its neighbours might have something to do with this. However, this might first require dispensing some additional budget resources to strengthen the capacities of the Competition Agency to deal with a larger number of cases.