

Unclassified

DAF/COMP/GF/WD(2006)25



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

17-Jan-2006

English text only

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

DAF/COMP/GF/WD(2006)25
Unclassified

Global Forum on Competition

ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

Contribution from Croatia

-- Session II --

This contribution is submitted by Croatia under Session II of the Global Forum on Competition to be held on 8 and 9 February 2006.

JT00200089

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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. Croatian Competition Act – Legal Definitions

1. Croatian Competition Act (CCA; CCAct)¹ (2003) provides legal definitions for hard core cartels. The notion of hard core cartels is covered under the section of the CCA which establishes the prohibitions of certain categories of agreements among undertakings².

2. Prohibited Agreements among Undertakings

2. The CCAct stipulates that there shall be prohibited all agreements between undertakings, contracts, single provisions of agreements, explicit or tacit agreements, concerted practices, decisions by associations of undertakings (hereinafter: agreements) the object or effect of which is to prevent, restrict or distort competition in the relevant market, and in particular those which:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage;
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

3. The above listed agreements that prevent restrict or distort competition, and which may not be exempted from above mentioned prohibitions, shall be declared as null and void.

3. Exemptions from the General Prohibitions

4. The conditions for exceptions from the prohibition of restrictive agreements, both individual and group, have been determined by the CCA and they are in line with the provisions of Article 81 (3) of the EC Treaty. Article 10 of the Competition Act lays down the conditions for exception for certain categories of agreements, such as agreements that contribute to improvement of production or distribution of goods and/or services, promote technical or economic progress, while allowing consumers a fair share of the resulting benefit, provided that such agreements do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, and afford such undertakings the possibility of eliminating competition in respect of a substantial part of the goods and/or services in question.

5. Furthermore, the CCAct recognizes that certain categories of agreements that contribute to improving the production or distribution of goods and/or services, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit shall be granted individual or block exemption under certain conditions³.

6. However, such agreements among undertakings may never:

- impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, and
- afford such undertakings the possibility of eliminating competition in respect of a substantial part of goods and/or services constituting the subject of the agreement.

3.1 Block Exemptions

7. The Competition Act provides in several provisions for horizontal and vertical restrictions the agreements may not contain, i.e. those which they may contain if they meet certain conditions. The restrictions concerned are set out in Article 9 of the Competition Act, according to Article 81 (1) of the EC Treaty. Block exemptions for agreements containing horizontal and vertical restrictions of competition fall within the scope of Article 10 of the Competition Act. The provisions of Article 10 regulate basic conditions the agreements must satisfy in order to be exempted; however, the detailed regulations on the matter are yet to be adopted pursuant to Article 10 paragraph (1) of the Competition Act. These regulations shall determine the conditions that particular agreements must contain, restrictions or conditions they may not contain, as well as other conditions that have to be fulfilled so as to make block exemption applicable.

8. The CCA Act establishes the notion of block exemptions for certain categories of agreements among undertakings which relate to the following categories of agreements⁴:

- agreements between undertakings not operating on the same level of production or distribution, and in particular, agreements on exclusive distribution, selective distribution, exclusive purchase and franchising;
- agreements between undertakings operating on the same level of the production or distribution, and in particular, research and development and specialisation agreements;
- agreements on transfer of technology, license and know-how agreements;
- agreements on distribution and servicing of motor vehicles, and
- insurance agreements.

9. Finally, block exemptions are regulated by corresponding bylaws adopted pursuant to the CCA, which are legally binding and based on EC Regulations 240/96, 2790/1999, 2658/2000, 2659/2000, 1400/2002 and 358/2003.

3.2 Individual Exemptions

10. The CCA provides for individual exemptions from the prohibition of restrictive agreements, and covers basic provisions on block exemptions. Individual exemptions are defined in Article 12 of the Competition Act, which lays down the procedure in deciding upon individual exemption for certain categories of agreements that contribute to improving the production or distribution of goods and/or services, or to promoting technical and economic progress, or those allowing consumers a fair share of the resulting benefit.

11. Namely, at the request of the parties to the agreement in question, the Agency may take a decision granting individual exemption from the banning of the agreement in question, if that particular agreement fulfils the conditions set out in the Law⁵.

12. Articles 10 and 11 of the Competition Act regulate the main issues concerning block exemptions, laying down conditions such agreements must comply with and restrictions they may not contain; at the same time they determine the adoption of regulations, which shall identify particular cases of block exemptions applied to vertical agreements, particularly exclusive distribution and selective distribution agreements, exclusive purchase agreements, franchise agreements; as well as horizontal agreements, and especially to the categories of research and development agreements, specialisation agreements, transfer of technology agreements, licensing and know-how agreements, agreements on motor vehicles distribution and servicing and insurance agreements.

13. The decision on individual exemption shall be issued upon the request of the parties to the agreement, for a limited five-year-period, whereby it may be extended for not longer than additional five years at the most. Further provisions define the decision on individual exemption in more detail, provide for the possibility to meet additional conditions and apply measures required for exemption, as well as time limits to be observed.

3.3 *De Minimis Rule*

14. CCA in its Article 13 establishes a notion of the De Minimis Rule, whereby it identifies agreements of minor importance as agreements in which parties to the agreement and the controlled undertakings have an insignificant common market share, on the condition such agreements do not contain provisions that in spite of the insignificant market share lead to prevention, restriction or distortion of competition. The agreements concerned shall be granted exception from the prohibition laid down in Article 9 of the Competition Act, if they comply with the Competition Act and meet the conditions laid down by a separate regulation.

15. According to the provision of Article 13 paragraph (4) the Agency holds the power to *ex officio* initiate proceedings on assessment of the agreement that complies with the conditions set for the agreements that fail under the scope of the De Minimis Exemption.

4. Investigative Techniques

4.1 *Collecting of Data*

16. In order to assess the very nature of the agreement among entrepreneurs, Agency conducts an investigation, during which it by the means of a written request⁶:

- seeks from the undertaking which participate in the agreement in question, in writing or through oral statements, all the required data, and ask for submittal of the required data and documentation for the inquiry;
- seeks to undertake a direct inspection of all business premises, all immovable and movable property, business books, data bases and other documentation;
- seeks the submission of other necessary data and information from other persons, which the Agency deems may contribute to solve and clarify certain issues on prevention, restriction or distortion of competition;

- orders to the undertaking to pursue other activities which it deems necessary for the purpose of stating all the facts relevant to the procedure.

4.2 *Right to Search Apartment, Business Premises and Seizure of Property*

17. If there is a reasonable doubt that any of the parties to the proceedings or a third person, holds in possession documents or other instruments relevant to the establishing of the material truth in the proceedings, the Agency shall request the competent Court of Misdemeanour in Zagreb to issue a written warrant ordering the search of particular persons, apartments, or business premises, and the seizure of objects and documents in possession of the undertakings concerned or a third person⁷.

18. The Agency can also request the competent r Court of Misdemeanour in Zagreb to issue a written warrant referred to in paragraph (1) of this Article also in cases when a party to the proceedings or a third person fails to act in accordance with the request of the Agency⁸.

4.3 *Right of Access to Files*

19. Parties to the proceedings carried out before the Agency have the right of access to case files and are allowed by the Agency to make a photocopy of the file or of single documents at their own expense⁹.

20. Without prejudice of the stated above, drafts of the decisions of the Agency, official statements and protocols from the sessions of the Council, internal instructions and notes on the case, correspondence and information exchanged with the European Commission or other authorities of the European Communities, as well as other documents considered an official secret in the sense of the CCA or other legal statutes, may neither be inspected nor photocopied.

4.4 *Secrecy obligation*

21. The president and the members of the Council, as well as the employees of the Agency, are obliged to keep and not to disclose any information classified as an official secret, irrespective of the way they came to know it, and the obligation of official secrecy shall also continue to be in effect after the expiry of their engagement with the Agency¹⁰.

22. Under the term official secret are considered, in particular the following:

- all which is defined to be an official secret by law or other regulations;
- all which is defined to be an official or a business secret on the basis of bylaw regulations or other regulations of the undertakings,
- all that undertakings, or natural persons who are parties in the respective proceeding, have defined as a business or an official secret;
- all correspondence with the European Commission and other authorities of the European Communities.

23. Without prejudice of the above, data and documents which have been made accessible to the general public in any way, or decisions of managing or administrative bodies of the undertakings published to be available to the general public pursuant to particular regulations, shall not be considered an official secret.

4.5 *Keeping Files and Documentation*

24. Files and documentation of the undertakings received by the Agency in the course of the proceedings or those elaborated by the Agency itself in order to carry out the proceedings, shall be kept in the archives of the Agency in accordance with the relevant rules on keeping of archive materials.¹¹

4.6 *Oral Hearing*

25. It is obligatory to hold the oral hearing in all cases with parties of contrary interests. The oral hearing is, open to public¹².

26. The Agency is entitled to conduct the oral hearing in any case when it deems useful, but, if the Agency, after it has received the written statement of the party against which it has started the proceedings, decides that the facts of the case between the parties is beyond dispute and that there are no other hindrances preventing the decision to be made, and if it is in the public interest, the Agency may render a decision without calling for the oral hearing.

27. If any of the summoned parties, or their attorneys, fails to appear at the first hearing in the proceedings, the Agency shall, as a rule, postpone the oral hearing and call for a new one.

28. If any of the summoned parties to the proceedings fail to appear at the following hearing, convened in accordance with the provision laid down in the CCA, the Agency shall not convene another oral hearing, but shall make its decision on the basis of its own findings, data and information.

5. *Interim Measures*

29. The Agency may decide upon interim measures where it deems that particular activities of restriction, prevention or distortion of competition, within the meaning of this Act, represent a risk by creating a direct restraining influence on undertakings, or on particular sectors of the economy or consumers' interests¹³.

30. In its decision on interim the Agency would suspend all actions, and order the fulfilling of particular conditions or impose other measures reasonably necessary to eliminate prevention, restriction or distortion of competition, as well as the duration of the relevant measure, which as a rule, may not exceed the period of three months.

6. *Time Limits for Decision-Making*

31. Agency enacts decisions within the time frame of three (3) months following the day of the resolution on institution of the proceedings¹⁴, having in mind that the entire proceeding shall be closed within four (4) months following the day of the starting of the proceeding. However, the Agency may also extend the time limit for the decision making for a subsequent period of three i.e. four months in cases where it is necessary to carry out additional expertise or analyses defining the state of facts and examination of the evidence, or where delicate industries or markets are concerned, about which the Agency has the obligation to inform the parties to the proceedings before the expiry of the prescribed time limits.

6.1 *Types of the Agency's Decisions, as Regards their Meritum*

32. In relation of the assessment of agreements among entrepreneurs, the Agency¹⁵ is, inter alia, entitled to render following decisions:

- whereas the assessment of the compliance of the agreement in case with the provisions of the CCA is made;
- whereas the exemption of an particular agreement pursuant to CCA is granted;
- whereas the interim measures are ordered, for the purposes of reinstating the fair competition conditions on the market;
- whereas it annuls, cancels or amends the previously made decision by means of a separate decision;
- whereas it determines particular measures to be taken in order to restore efficient competition in cases of prohibited concentrations,
- whereas it renders other kinds of decisions, whatsoever, which serve as the legal basis for various kinds of procedural orders in a course of the proceeding.

6.2 Court Protection

Article 58

Against the decisions of the Agency referred to in previous section of this paper, no appeal is permitted, for they are final as regards their litispensation before the administrative authorities, but the challenging party may file an administrative dispute before the Administrative Court of the Republic of Croatia¹⁶.

6.3 Publication

33. Decisions, i.e. verdicts that Agency brings are published in the Official Gazette¹⁷ *Narodne novine*. Also the rulings and other kinds of decisions rendered from the side of the Administrative Court in matters concerning claims against the Agency's decisions are published in the Official Gazette. Frequently Agency publishes some of its decisions and/or expert opinions which might be of greater interest for wider public on its website (www.aztn.com).

34. However, the data which are contained in the respective acts of the Agency are treated as official secret,¹⁸ and therefore are never published without prior permission of the parties.

7. Penalties

7.1 Initiation of Proceedings before the Court

35. Based on the condemnatory ruling of the Agency, whereas as a result of the proceeding before the Council, the infringement of the Competition Act was found, the Agency issues a claim, which is served to the Court of Misdemeanour, for starting the proceeding against the undertaking and/or its management.¹⁹ The result of said proceeding would be, if the Court established the violation as it was proposed by the Agency's claim, financial fine for the party against which the proceeding was led.

7.2 Severe Violations of the Provisions of this Act

36. The undertaking – legal or natural person, shall be fined at the most 10% of the value of its total annual turnover in the financial year preceding the year when the infringement was committed²⁰, if it:

- concludes a prohibited agreement or participates in any other way in the agreement that caused prevention, restriction or distortion of competition in the sense of Article 9 of the CCA;
- abuses a dominant position (Article 16 of the CCA);
- participates in prohibited concentration of undertakings (Art. 18 of the CCA); or
- fails to comply with the decision made by the Agency in which it orders some obligatory interim or final measures (Article 57 items 1 to 7 of the CCA).

37. For the above listed infringements referred the management of the undertaking – legal person concerned can also be fined ranging from cca 10.000 through 40.000 Euro.

7.3 *Fines for Other Violations of the Provisions of this Act*

38. The undertaking – legal or natural person shall be fined at the most with 1% of the value of its total annual turnover in the financial year preceding the year when the infringement was committed²¹, if it:

- submits to the Agency incorrect or untrue information which may influence the rendering of the decision on individual exemption of the agreement (Article 14 paragraph (1));
- fails to notify the Agency on the proposed concentration (Article 22);
- submits to the Agency incorrect or untrue information in the concentration assessment proceedings (Article 25, Article 26 paragraph (1) item 1);
- fails to act according to the request of the Agency (Article 47 paragraph (3), Article 48 paragraph (1) and (3));
- fails to act according to the decision of the Agency (Article 57, item 8);
- fails to act according to the written order of the misdemeanour court (Article 49).

39. For the infringements listed in paragraph above the responsible person of the undertaking – legal person concerned can also be fined in an amount ranging from 2,000.00 to 10,000.00 Euro

7.4 *Fines for Persons that are not Parties to the Proceedings*

40. The undertaking - legal person that is not a party to the proceedings before the Agency shall be fined for the infringement committed an amount ranging from 2.000 to 10,000.00 Euro if it fails to act upon the request of the Agency²²

41. For the infringement referred to in paragraph above, the responsible persons of the legal person in question can also be fined an amount ranging from 1.000 to 2.000 Euro.

42. Furthermore, the undertaking and/or natural person that is not a party to the proceedings before the Agency and that fails to act according to the request of the Agency can be fined for the minor infringements in amounts up to 2. 000 Euro.²³

8. Statutory Limitation

43. The minor offence proceedings instituted upon the violation of the provisions of the Competition Act may not be started after three years from the day when the infringement was committed²⁴.

44. The limitation period referred to in paragraph above shall be interrupted by any action of the competent body undertaken for the purpose of persecuting the offender. After any interruption, the limitation period shall be restarted; however, the minor offence proceedings may in no case be conducted after the expiry of the double time limit laid down in paragraph above.

45. Furthermore, the imposed penalties may not be enforced if three years have passed from the date when the decision on the violation became legally valid.

46. However, the statutory limitation for the enforcement of the penalty shall be interrupted by any action of the competent body that is undertaken for the purpose of the enforcement. After any interruption, the limitation period concerned shall be restarted; however, the penalty may not be enforced after the expiry of the double time originally needed for statutory limitation, i.e. six (6) years.

9. Concluding Remarks; Cooperation with the Courts

47. As final words in finishing of this paper it is certainly worth to stress out that Agency cooperates with courts, as well as other administrative authorities, in resolving the cases relating to prevention, restriction or distortion of competition in the market of the Republic of Croatia²⁵.

NOTES

1. Croatian Competition Act - CCA (2003) stipulates the rules and the system of measures for the protection of competition, regulates the powers, duties and the organisation of the authorities entrusted with the protection of competition, as well as the procedure for the implementation of this Act. CCA shall also apply to all forms of prevention, restriction or distortion of competition within the territory of the Republic of Croatia or outside its territory, if such practices take effect in the territory of the Republic of Croatia, unless differently stated by particular regulations for certain markets. Furthermore, the CCA shall also apply to companies, sole traders, craftsmen and other legal and natural persons that participate in economic activities in trade of goods and/or services. The provisions of this Act shall apply correspondingly to all legal and natural persons that are engaged in a single or temporary trade of goods and/or services in the market. This Act shall apply to legal and natural persons that have their seat and permanent residence abroad, provided that their participation in the trade of goods and/or services affects the home market. This Act shall also apply to legal persons, whose founders, shareholders or holders of share capital are the state or local and regional municipalities. This Act shall also apply to legal and natural persons entrusted pursuant to special regulations with the operation of services of general economic interest, or which are by exclusive rights allowed to undertake certain business activities, insofar as the application of this Act does not obstruct, in law or in fact, the performance of the particular tasks assigned to them by special regulations and for the performance of which they have been established; (art. 1 thru 4)
2. Art. 9 of the CCA
3. see Art. 10 of the CCA
4. see Art. 11 of the CCA
5. see Art. 12 in connection with the Art. 10 of the CCA
6. see Art. 48 of the CCA
7. Art. 49 of the CCA
8. As referred in the Art. 37 item 8 and 9, and Article 48 of the CCA.
9. Art. 50 of the CCA
10. art. 51 of the CCA
11. art. 52 of the CCA
12. art. 54 of the CCA
13. see art. 55 of the CCA
14. see art. 56 of the CCA
15. see Art. 57 of the CCA
16. see Art. 58 of the CCA
17. see Art. 59 of the CCA
18. in the sense of Article 51 of the CCA

19. Art. 60 of the CCA
20. see Art. 61 of the CCA
21. see Art. 62 of the CCA
22. see Art. 63 of the CCA; in connection with Article 37 items 8 and 9, Article 48 paragraph (1) items 3 and 4 and paragraph (3).
23. Article 37 items 8 and 9 and Article 48 paragraph (1) items 3 and 4 and paragraph (3) of the CCA.
24. See Art. 64. of the CCA
25. see Art. 65 of the CCA