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ISSUES – Contribution from Croatia****- Session IV -**

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More documentation related to this discussion can be found at: [oe.cd/mktcomp](http://oe.cd/mktcomp).

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## *Using market studies to tackle emerging competition issues*

### **- Contribution from the Republic of Croatia -**

#### **1. Introduction**

1. National competition authorities have different instruments which they can use when applying the competition rules. Some tools are more technical or procedural, such as request for information, surprise inspections, interviews, whereas others are more sector-based tools such as market analysis or sectoral inquiries. This contribution describes relevant considerations for using market studies as appropriate instruments to address actual competition issues or problems which do not necessarily require enforcement. By using examples from Croatian practice, the contribution will also address market studies as a starting point for enforcement action.

#### **2. Main considerations and benefits of using market study tool**

2. Croatian legislation does not give explicit competence to the Croatian Competition Agency (further: CCA) for conducting market studies but this competence derives from the provisions establishing activities of the Council (decision-making body of the CCA) and tasks of the expert team of the CCA.<sup>1</sup> Mentioned provisions give the power to the Council to instruct the expert team to carry out the preliminary investigations in the relevant market and to define methodological principles for competition studies and market investigation. The expert team is entrusted with the tasks to carry out preliminary investigations in the relevant market with the view to defining sufficient indications of competition concerns, collect data and information from legal or natural persons, professional associations or economic interest groups, associations of undertakings, consumers associations, public administration authorities and local and regional self-government units which may have certain knowledge that can contribute to the investigation of the market and identifying market positions, regardless of the concrete cases handled by the CCA and which might be necessary for the definition of market position in particular markets and identify and analyse market conditions with the purpose of further development of effective competition.

3. Main considerations when deciding about certain market study include: available resources, importance of particular market for competition, suspicion about cartel or some prohibited behaviour on certain market, flaws in the functioning of some markets and new emerging fast-moving markets. First consideration for each competition authority is how many resources can be dedicated to conducting of market study taking into account the necessity to engage sufficient experts for on-going cases. This requirement is usually more challenging for small competition authorities with lower number of expert staff. Larger competition authorities have whole teams dedicated to research markets and they are even divided and specialized according to certain markets and sectors (energy, telecom, food, financial services, pharmaceuticals, digital etc.). In order to overcome this challenge, it is good to have separate chief economist office whose task would be to conduct market

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<sup>1</sup> Articles 30 and 32 of the Competition Act, "Official Gazette", No. 80/13, 79/09; <http://www.aztn.hr/en/antitrust-and-mergers/legal-framework/>

studies as well as to supervise and help case teams with analysis of the markets. Another point about resources is the availability of financial resources for engaging external experts for preparing more complex market studies which require some specific knowledge (such as technical knowledge) which many competition authorities lack. If some information as announcements in the news, on internet, tips etc. indicate that there might be a cartel or some other serious breach of competition rules on particular market this is often a trigger to start a market investigation. Similarly, if there are indications that some markets do not function well due to certain deficiencies, it is also considered for market study. Finally, new and emerging markets such as now digital markets of fast changing markets such as usually telecommunication markets always present good basis for preparing market studies.

4. The CCA considers market investigations as valuable sources of information about functioning of markets which can serve as an instrument of correcting behaviour of undertakings on the market. It conducts market studies as research projects with the purpose of gaining an in-depth understanding of how particularly sensitive sectors or markets work. These market studies are carried out on the CCA's own initiative with the view to detecting and removing any market failures and anticompetitive practices of the undertakings. Some of these market studies have been regularly and traditionally conducted for more than 15 years, such as the retail groceries' market study (market research in food, beverages, toiletries and household supplies) and the press publishing market study. In addition, each year, the CCA performs other market studies such as the pharma, insurance, dairies and milk products market studies.

5. The market studies are important competition advocacy tool, they are pointing to particular potential competition concerns with interest of consumer in focus, put special emphasis on fast growing industries (telecom, digital), they can provoke legislative action based on the results of the market studies and recommendation to the Government to change laws. At the same time market studies can internally serve as very valuable source of information for other departments of the competition authority. Last but not least, market studies can trigger initiation of formal competition law proceedings.

### 3. Experience in using market studies as a source of enforcement action-case examples

6. In the practice of the CCA, several market studies have been used as a trigger to open the formal proceedings. Some are elaborated in the continuation of this contribution.

#### 3.1. Retail groceries' market study (market research in food, beverages, toiletries and household supplies) in 2011

7. As a result of this market study several proceedings were opened and in some of them prohibited agreements were established.

8. Cases: Kutjevo d.d./KTC d.d.; Konzum d.d. /Dukat d.d.

9. The CCA declared the agreements entered into by Dukat and Konzum, and Kutjevo and KTC, null and void and at the same time it imposed sanctions for the infringements of Competition Act to the undertakings concerned. In both cases it was established that the undertakings concluded prohibited vertical agreements causing harm to the consumers and imposing restraint on competition.

10. In the first case, with regard to the agreement concluded between the undertakings Dukat and Konzum, the CCA found that the annexes to the sales agreement which were concluded between these parties from January 2009 to January 2011 contained provisions that were binding for Konzum in so far as the latter was obliged to apply minimum wholesale and retail prices imposed by the undertaking Dukat. If Konzum as a buyer would not comply with these restrictive provisions, Dukat could have terminated the supply of its products.

11. In the second case, regarding the agreement concluded between the undertakings Kutjevo and KTC, the CCA found that the agreement between these two undertakings which was in force from January 2010 to April 2011 contained provisions on the basis of which Kutjevo as the supplier of products imposed on KTC the agreed minimum resale price restrictions in regard to its final consumers, as it was clearly defined in the appendix to the agreement. If KTC would not comply with these restrictive provisions, Kutjevo could have unilaterally terminated the agreement.

12. In both above mentioned cases the CCA established hardcore restrictions of competition rules on the account of the fact that provisions in agreements involving vertical price restrictions or minimum resale price restrictions are always prohibited regardless of the fact whether they have actually been applied or not, and regardless of the market share of the parties to the agreement. These provisions restrict the seller to freely set the prices which directly affects the interests of the final consumers.

13. However, taking into account that the Competition Act entered into force on 1 October 2010, it could have been applied in both above described cases of established prohibited vertical agreements only to the period after its entry into force. In other words, and it has been stated in the decision of the CCA, the duration of the prohibited agreement between Dukat and Konzum was from 1 October 2010 to 17 January 2011, whereas the duration of the prohibited agreement between Kutjevo and KTC was from 1 October 2010 to 15 April 2011.

14. Given their market position and significance in the Croatian market regarding their line of business the undertakings concerned undoubtedly must have been acquainted with competition rules. However, when imposing the sanctions, the CCA took into account the fact that the duration of the established infringements was relatively short and that the prohibited provisions actually did not apply and therefore did not significantly impede competition.

15. The CCA also took into account the fact that the participating undertakings revised the challenged provisions on their own initiative before the CCA initiated the proceeding and that the new agreement entered into by Dukat and Konzum on 17 January 2011 and the new agreement entered into by Kutjevo and KTC on 15 April 2011 did not contain the minimum resale price restrictions i.e. the minimum prices below which the seller may not sell the products of the supplier to the final consumer.

16. Hence, the fines imposed by the CCA on the parties to the prohibited agreements were symbolic, in compliance with their market position and financial and market power. In both cases it was the opinion of the CCA that these symbolic fines are adequate for the said infringements, at the same time producing a preventive effect on the participating undertakings but also a deterrent effect which should keep other undertakings from any further infringements of competition law.

### 3.2. The market study/sector inquiry of the Horeca channel (sector of the food service industry that consists of establishments which prepare and serve food and beverages) 2018-2019

17. CCA vs. Coca cola HBC Croatia

18. In the course of 2018-2019 the CCA conducted market study on the market of distribution of non-alcoholic drinks in so called HORECA channel (hotels, restaurants, cafes, bars) on the territory of Croatia. The study revealed several agreements with restrictive provisions between Coca Cola HBC Croatia and its customers. The CCA started ex officio proceeding on 20 February 2019 on the basis of both Article 8 (prohibited agreements) and Article 13 (abuse of a dominant position) of the Competition Act.

19. The agreements between Coca-Cola and its customers in the HORECA channel contained exclusive purchasing obligations that had as their object or effect the exclusive purchasing of Coca-Cola products.

20. The provisions contained an obligation which made the buyer purchase all his requirements in fruit juices, ice teas, energy drinks and mineral waters exclusively from the brands in Coca-Cola range of products, at the same time imposing the obligation on the buyer to constantly offer the whole product assortment of Coca-Cola carbonated beverages but also all of its new products in this category of soft drinks. In turn, the buyer was entitled to an agreed incentive.

21. The Coca-Cola also concluded agreements with other catering facilities imposing the obligation on the buyer to exclusively stock and offer to its customers the Coca-Cola products (fruit juices, ice-teas, energy drinks and mineral waters) as long as the agreement is in force.

22. At the early stage of the proceeding Coca-Cola voluntarily committed to revise all the business agreements with its buyers in the HORECA channel within a four-month-period.<sup>2</sup>

23. The commitments offered included the following:

1. Since Coca Cola holds a dominant position on the market segment of cola drinks, it committed to conclude separate business contracts for its programme of carbonated non-alcoholic beverages separating them from the business contracts that will be separately concluded for its programme of non-carbonated non-alcoholic beverages (fruit juices, energy drinks, ice-teas, mineral water, herbal beverages) and alcoholic beverages in which it does not hold a dominant position in the market.
2. The business contracts regulating the sale of non-carbonated non-alcoholic and alcoholic drinks can contain exclusive purchase provisions but only provided that the buyer can freely decide whether it would prefer to offer exclusively the selected Coca-Cola products, which excludes the same products of other manufacturers, or it would prefer to have a particular product of Coca-Cola brand available in its offer of a particular type of products. In later case there are no restrictions imposed on the buyer to include the equivalent products of the competing Coca-Cola brand producers in its offer.

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<sup>2</sup> This deadline was prolonged for another four months due to COVID-19 situation based on the request from Coca Cola to the CCA.

3. The duration of the business agreements containing the provisions on exclusive purchase may not exceed five years. The five-year period should also include the duration of the so far concluded agreements that contain the exclusive purchase obligation.
  4. In all the business agreements the expenditures for marketing activities will be calculated separately for every category of products whereas the provision regulating the application of the agreement on all future products will be deleted from all new agreements.
  5. Coca-Cola committed itself to introduce a separate compliance programme and to carry out the compliance training for its employees in the area of competition rules.
24. The commitments were published on the CCA's web site and no comments were received. Thus, after market test, the CCA adopted decision on 29 November 2019 by which it accepted commitments and closed the infringement proceeding. Coca Cola submitted evidence that it fulfilled the commitments and CCA established that Coca-Cola fully complied with the commitments specified in the decision of the CCA.

#### 4. Using market studies to tackle emerging competition problems

Nowadays when the competition authorities are faced with new challenges brought by digital markets, changes in the definition and analysis of markets are needed and here the role of market studies can be significant and help to understand how those markets work and consequently how to approach them when assessing competition concerns. For that reason, many competition authorities started analysing how digital markets should be defined, how they function and what would be the right approach towards them.<sup>3</sup> Some of those current issues are: digital platforms and how to properly analyse them if the market analysis show that traditional instruments are not adequate, how to approach them as gatekeepers, how to treat on line advertising and algorithms, should there be limits to the access to data etc. However, it is not only for digital markets, there are other concerns which may arise and which are market specific and they can also present new elements in market studies, such as influence of current global COVID-19 pandemic.

#### 5. Final remarks/Conclusion

25. The practice of using market studies showed that they are good source of information to establish how certain markets work, to promote competition and to trigger enforcement action. There are several considerations that competition authorities use when deciding to conduct market study which vary from resources to possible competition problems on certain markets. Undoubtedly, with good allocation of resources, market studies should continue to be used in order to improve overall level of competition enforcement and most importantly they can help to address new emerging issues especially nowadays in the light of digital markets.

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<sup>3</sup> For example, initiative of the European Commission to revise Notice on Definition of Relevant Market, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12325-Evaluation-of-the-Commission-Notice-on-market-definition-in-EU-competition-law>; French Competition Authority On Line Advertising Study, <http://competitionlawblog.kluwercompetitionlaw.com/2018/03/16/french-competition-authority-concludes-online-advertising-sector-inquiry-announces-possible-actions/>