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**REMEDIES AND COMMITMENTS IN ABUSE CASES – Contribution from Croatia**

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

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## *Remedies and Commitments in Abuse Cases*

### **- Contribution from Croatia -**

#### **Introduction**

1. One of the core principles in administrative proceedings is the principle of procedural economy and one of the main incentives of competition law is to restore the competition on the market as soon as possible. Those two principles taken together are reflected in interrelated instruments of competition law: commitments and remedies. The commitment decisions contribute to fast eliminating the negative effects on competition due to undertaking's actions or a failure to act. The remedies, structural and behavioural, ensure that the competition on the market is again restored, further respected and ensured. This contribution describes the experience of Croatian Competition Agency (further: CCA) in adopting commitment decisions and imposing remedies in abuse of dominance cases by presenting the legal basis and practical examples of cases from the practice of the CCA. Furthermore, structural and behavioural remedies in decisions of the CCA are presented and analysed and finally, the paper looks at the compliance with commitments and to ex-post evaluation.

#### **1. Legal basis and criteria for imposing remedies and commitments**

2. Main legal basis for imposing remedies and commitment decisions is contained in the Croatian Competition Act.<sup>1</sup> Based on the Article 14 of the Competition Act, every decision establishing the abuse of a dominant position can impose the measures, conditions and deadlines for the removal of adverse effects of such practices. In that respect, the CCA may also impose behavioural remedies and/or structural remedies which are proportionate to the infringement committed and which are necessary to bring the infringement to an end. Regarding commitments, Article 49 of the Competition Act provides that the party to the proceeding may offer its commitments to the CCA. Such commitments should meet certain conditions and obligations within a set time periods, with the view to eliminating the negative effects on competition due to the party's actions or a failure to act.

3. However, procedurally, commitments can be submitted only until certain moment in the proceeding before the CCA, the latest, before the Statement of Objections has been received. The procedural steps are then following: The CCA adopts the decision by which it accepts and makes the commitments binding on the undertaking concerned if the CCA concludes that the proposed conditions and obligations within a set time periods are found sufficient for the removal of competition concerns and the restoration of effective competition.

4. Mentioned decision of the CCA will establish a specified time period in which the undertaking in question should comply with the commitments and at the same time it will

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<sup>1</sup> Zakon o zaštiti tržišnog natjecanja (Competition Act), Official Gazette No. 79/09, 80/13, 41/21. Available in English at: <https://www.aztn.hr/ea/wp-content/uploads/2015/05/COMPETITION-ACT-2021-consolidated-text-1.pdf>

oblige the undertaking to provide the evidence that it has implemented the commitments concerned. On that basis, the CCA decides that there are no legal grounds to any further actions against the undertaking concerned.

5. The main criteria used by the CCA when considering the appropriateness of the commitments proposed is, first of all, the duration of the infringement so it is more likely that the commitments will be accepted if the infringement is of short duration. Another important element is the level of cooperation of the undertaking with the CCA, so where the undertaking concerned has been open to cooperation in the course of the proceeding, the chances of adopting commitment decision is greater. Finally, the commitments have to be proposed in the first six months from the initiation of the proceeding, particularly where the action by the CCA involves a larger number of parties, and in other cases where the CCA deems the acceptance of the proposed commitments to be justified and appropriate for efficiency reasons with the view to restoring effective competition in the relevant market without carrying out a lengthy procedure.

6. There is also market test envisaged, the CCA gives notice on its intention to accept the commitments on its web site and to that end publish a summary of the case and the proposed commitments. The interested parties are requested to submit their written replies in the form of comments, observations, and statements within 20 days from the day of the publication of the request for information.<sup>2</sup>

7. Besides national law, to a lesser extent, relevant EU legislation is taken into account, such as EU Regulation 1/2003<sup>3</sup> and Communication of the EC-Guidance on the Commission's enforcement priorities in applying Article 82 EC Treaty (Article 102 TFEU) to abusive exclusionary conduct by dominant undertakings.<sup>4</sup>

8. There are no specific guidelines on commitments and remedies available while the above-described provisions of the Competition Act seem to be sufficient in practice.

9. The commitment decisions can be appealed like any other decision of the CCA, by filing a complaint for an administrative dispute against the decision of the CCA at the High Administrative Court of the Republic of Croatia within 30 days from the receipt of the decision.

10. However, so far none of the commitments decisions has been contested due to the fact that the CCA accepted the commitments proposed by the parties, there was no infringement established, nor any fine imposed in such decisions so there was no incentive for the parties to submit the claim against the commitment decision.

## 2. Case law of the CCA and its commitment decisions

11. The commitment instrument has been used frequently in the practice of the CCA, both in prohibited vertical agreements and abuse of a dominant position cases, especially in the last ten years.<sup>5</sup> There is slight downwards trend in abuse cases but the commitments

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<sup>2</sup> Article 49, paragraph 5 Competition Act.

<sup>3</sup> Council Regulation No 1/2003, of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ L 1, 4.1.2003*.

<sup>4</sup> *OJ C/45, 24.2.2009*.

<sup>5</sup> From 2010 until 2019 approximately 13 cases were completed by accepting commitments in alleged abuse of a dominant position.

are still being proposed in the cases of the CCA. The examples of several cases from the practice of the CCA are further presented in this paper.

## 2.1. CCA vs. HRANA TEC

12. In June 2018, based on the initiative made by the undertaking PIK Vrbovec Mesna Industrija d.d., the CCA started ex-officio proceeding to investigate whether the undertaking Hrana Tec d.o.o. abused a dominant position in the sales of spare parts and provision of repair and maintenance services for Poly-clip System clipping machines in the territory of the Republic of Croatia. The complainant had claimed that in September 2017 it ordered and paid for an original spare part for the clipping machine but the authorised repairer Hrana Tec refused to install the part concerned as soon as it noticed that the clipping machine concerned already contained consumables that had been purchased from a distributor different from Hrana Tec. At the same time, Hrana Tec allegedly warned PIK Vrbovec that if it continued to purchase productive material from any other manufacturer and to install it in Poly-clip System clipping machines, Hrana Tec would refuse to supply it with spare parts and consumables and provide repair services. In addition, the complainant was concerned about the free-of-charge servicing or charging only a flat rate by Hrana Tec to all its customers that buy consumables exceeding a certain value of purchase. This could have resulted in a spill-over of its significant market power to another market. In the course of the investigation the CCA found that it was only once that Hrana Tec refused to install a display for the undertaking PIK Vrbovec. Apart from this one isolated case, it has been established that no competing undertaking of the undertaking PIK Vrbovec had any difficulties in business dealings with Hrana Tec. At the early phase of the proceeding Hrana Tec proposed commitments that quickly eliminate possible anticompetitive effects in the provision of repair and maintenance services and thereby restore effective competition in the relevant market concerned. In addition, during the market tests that had been carried out in this matter the CCA did not receive any comments. Hence, the CCA in May 2019 closed the infringement proceeding against the undertaking Hrana Tec d.o.o. by accepting the commitments proposed voluntarily by this undertaking. More concretely, Hrana Tec committed itself to provide its repair and maintenance services to all its customers under equal terms regardless of the value of the purchase of Poly-clip System clipping machines. Hrana Tec obliged itself to submit the revised price lists to the CCA serving as evidence of the implemented measures within two months after the receipt of the CCA's decision. Taking everything into account, the CCA accepted the commitments to redress the effective competition and terminated the proceeding against the undertaking concerned without bringing an infringement decision.<sup>6</sup> The undertaking Hrana Tec complied timely with all its measures and obligations.

## 2.2. CCA VS. FLORA VTC

13. The proceeding against the undertaking Flora VTC the CCA opened in April 2016 with the aim to establish whether the undertaking in question has been engaged in abusive behaviour on the basis of the applicable Prices for Funeral Services in the Town of Virovitica taking into account its dominant position in the provision of burial services on cemeteries in the territory of the town of Virovitica that may result in distortion of competition in the funeral supplies and mortuary equipment market. The CCA established within the proceeding, that on the basis of the Prices for Funeral Services adopted on 23 October 2015 Flora VTC has tied the price of the burial service (that is discharged as a

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<sup>6</sup> Decision of the CCA from 13 May 2019, <https://www.aztn.hr/ea/wp-content/uploads/2019/06/UPI-034-032017-01025-2.pdf>

public service) to the sales of its own funeral supplies and mortuary equipment (that it carries out as a commercial service) thereby limiting the access to the market concerned for the competing undertakings. This behaviour led to market foreclosure and involved exclusionary practices and it has also a negative effect on the consumers relating to the choice of products, price and quality. In other words, such a practice could create a belief that other undertakings in the funeral supplies and mortuary equipment market are less competitive than Flora VTC.

14. This is why the CCA adopted also an interim measure ordering Flora VTC the disapplication of the part of the Prices for Funeral Services giving 10% discount on the burial service if a client also buys funeral supplies from the undertaking concerned. In addition, Flora VTC was ordered to stop advertising the discount concerned in any form and to remove such content from all the existing signs, posters, fliers, business cards i.e. any form of sales promotion. The interim measure was imposed for the period of six months.

15. Soon after the initiation of the proceeding Flora VTC offered the disapplication of the part of the Prices for Funeral Services giving 10% discount on the burial service if a client also bought funeral supplies from the undertaking concerned. Flora VTC offered also to make this decision public on its website, thus restoring the situation before the challenged 10 % discount entered into force. The CCA assessed that it is appropriate to accept commitments offered by the party under investigation. It found that the nature of the commitments and their ability to quickly and effectively resolve the competition concerns are sufficient to eliminate possible anticompetitive effects in the relevant market in the sales of funeral supplies and mortuary equipment in the territory of the town of Virovitica. Such a decision also takes into consideration the interests of the economic operators who can continue to perform the same activities in the market, whereas it enables the users of these services to freely choose the undertaking that will provide them with funeral supplies and mortuary equipment. The commitments accepted are binding on the undertaking and the CCA carried out the monitoring of the proper implementation of its decision. In case that Flora VTC should not comply with the undertaken commitments, the CCA can decide to re-open the infringement proceeding and impose the appropriate sanctions.<sup>7</sup>

### 2.3. CCA vs. NAVELA PULA

16. In its decision from 15 September 2016, the CCA accepted the commitments offered by the undertaking Navela from Pula in the proceeding against this undertaking in the distribution of spare parts for Yanmar marine engines. The proceeding against the undertaking Navela d.o.o., Pula, was initiated on 30 July 2015, on the basis of the information and the documentation collected during the preliminary market investigation in the other case. In the course of the preliminary market investigation it has been established that the spare part at issue was the Engine Control Unit (ECU) that is not a typical spare part that has been regularly delivered to unauthorised repairers but a unit that falls under a special replacement protocol provided by Yanmar, applicable within and outside the warranty period, a fact that has also been confirmed by an independent expert witness in the field of engineering and shipbuilding. It was also the view of the expert witness that the diagnostics, replacement, programming and starting the operation may solely be carried out by an authorised and trained operator that has been certified by Yanmar service centre whereas the diagnostics and programming requires special

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<sup>7</sup> Decision of the CCA from 18 August 2016, <https://www.aztn.hr/ea/wp-content/uploads/2016/09/UPI-034-032015-01045-1.pdf>

equipment and an adequate programme (firmware) applicable to a particular series and type of Yanmar engines.

17. The proceeding against the undertaking Navela was initiated by the CCA on 30 July 2015, first, due to the indices that Navela refused to deliver and to sell the spare parts for one vessel, unless the whole business was transferred to another, specified service provider. Second, there have also been indices that the Standard Contracts for Maintenance and Repair of Marine Engines, Purchase of Engines and Spare Parts of Yanmar brand that Naval has concluded with the members of its network, contained provisions that may raise competition concerns. At an early stage of both separate proceedings Navela reacted by offering commitments to eliminate possible anticompetitive effects in the market. Navela offered remedies committing itself to deliver the spare parts for Yanmar marine engines to any interested operators, including the unauthorised repairers. In the case of specific inquiries, including the ECU and other electronics that requires specific training and tools, Navela shall first of all refer every customer to the authorised repairers' network.

18. Should the customer refuse such a proposal, it would have to sign a statement confirming that it does not agree to be referred to an authorised repairer and takes the responsibility for all consequences that may arise as a result of the incorrect replacement of a spare part, including the consequences that such behaviour may have on third persons and their property. The CCA found that the above commitments voluntarily proposed by Navela are adequate to eliminate possible competition concerns that could have arisen had the behaviour of Navela in the relevant market remained unchanged and sufficient to restore effective competition in the relevant market concerned. In addition, in the market tests that have been carried out in this matter the CCA has not received any comments.<sup>8</sup>

#### 2.4. CCA vs PEUGEOT HRVATSKA

19. On 3 July 2014 the CCA initiated ex-officio infringement proceeding against the undertaking Peugeot Hrvatska d.o.o. for the establishment of prevention, restriction or distortion of competition based on the alleged abuse of a dominant position within the meaning of Article 13 of the Competition Act in the following relevant markets: the provision of repair and maintenance services for motor vehicles of the car make Peugeot in the territory of the Republic of Croatia and the sale of spare parts for motor vehicles of Peugeot car make in the territory of the Republic of Croatia, based on the indices in accordance to which Peugeot Hrvatska applied the Selective criteria for authorised Peugeot repairers in a non-transparent manner when deciding whether to accept or to retain a certain repairer in the network after 31 December 2013, whereby it applied dissimilar conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage, concretely, by unjustifiably denying access to the relevant market to the undertaking Auto Maksimir.

20. In the said proceeding against undertaking Peugeot Hrvatska, the CCA accepted the commitments proposed by the undertaking. The CCA found the proposed remedies adequate for the elimination of the possible anticompetitive effects and the restoration of effective competition in these markets. In this respect the CCA found that the proposed commitments undertaken on the own initiative of the undertaking Peugeot Hrvatska ensured that Auto Maksimir, which has for many years been the authorised dealer of new Peugeot motor vehicles and authorised repairer for Peugeot motor vehicles, and once it has left the network of authorised dealers for new motor vehicles, remains in the network of

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<sup>8</sup> Decision of the CCA from 15 September 2016, <https://www.aztn.hr/ea/wp-content/uploads/2016/10/UPI-034-032015-01030.pdf>

authorised Peugeot repairers, which is in line with the EU practice. Peugeot Hrvatska committed itself to supply all brand identity elements to Auto Maksimir within 3 working days from the receipt of the decision of the CCA for the purpose of implementation of the Authorised Repair Agreement for the repair shop located in one address in Zagreb. It also committed itself to keep in force the Authorised Repair Agreement for the repair shop of Auto Maksimir located in another address in Zagreb until 29 November 2015 at the latest, i.e. the date when Auto Maksimir planned to close down the authorised repair activities for Peugeot motor vehicles and continue to provide repair services and sell spare parts for Peugeot cars on the location of its repair shop in the first address in Zagreb. Finally, Peugeot Hrvatska will not oppose to erecting of any additional road signs by Auto Maksimir in the neighbouring streets that would in accordance to the new brand identity elements lead to the repair shop entrance.<sup>9</sup>

### 3. Structural and behavioural remedies and types of commitments in decisions of the CCA

21. Structural measures usually include sale of part of the business of undertakings or its shares, leaving the part of the offer to competing products, maintaining in force existing contracts or conclusion of new contracts with suppliers, for example, under the same and transparent conditions.

22. Behavioural measures are mostly performed by some sort of monitoring of altered behaviour of the undertaking in the market, such as obligation to submit special reports like auditing reports on the implementation of the measures accepted or imposed by the competition authorities or nominating independent trustee for monitoring of measures. The main difference between those two types of measures is that structural measures have immediate effect and in principle they should not be subject to future changes whereas the behavioural measures are applied during set time period and they can be modified or annulled as a result of significantly changed circumstances.

23. The starting point and main criteria when deciding on the remedies is whether proposed measures are sufficient to remove negative effects on competition and to restore again effective competition. There is also proportionality test applied in the Competition Act stating that structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.<sup>10</sup>

24. In most abuse cases with commitments from the practice of the CCA, structural remedies were imposed and, in some cases, together with structural measures, some behavioural measures were also set in the form of obligations of said undertakings to submit to the CCA reports on the effects of proposed measures supported by the evidence usually every six months during the time period of two years. For example, the case *CCA vs. Tisak d.d. Zagreb*, in the monitoring procedure, undertaking Tisak had the obligation in the following two years to submit to the CCA semi-annual reports on the effects produced by the measures concerned demonstrated by the evidence that the associations of undertakings

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<sup>9</sup> The decision of the CCA from 28 September 2015, <https://www.aztn.hr/ea/wp-content/uploads/2015/10/UP-I-034-032014-010051.pdf>

<sup>10</sup> Article 14, paragraph 2 of the Competition Act.

have been granted a status of a buyer and that the additional group rebates have been awarded.<sup>11</sup>

25. Types of commitments and remedies most frequently offered and accepted by the CCA include:

26. modifications and amendments of the provisions of agreements or general terms of business, change of price lists or application of new price lists to make it more transparent and equally applied for the same categories of buyers, publishing on the website a notice that all interested buyers can buy the products without any restrictions, adoption of compliance programs and elaborated training programs as commitments measures. It is important to emphasise that in all those cases the CCA requested the evidence that measures are implemented, notifications, reports, announcements on the web site, changed text or annex to the agreements submitted to the CCA, competition compliance programs, attendance lists from held trainings etc.

27. The CCA concluded the bilateral agreements on cooperation with most of the sectoral regulators and even though the cooperation includes several exchanges of information and expert assistance, so far there was no joint creation of remedies or their implementation in the cases dealt with by the CCA. In addition, majority of remedies and commitments cases were not applied in the regulated sectors.

#### 4. Compliance with remedies and commitments and ex-post evaluation

28. The compliance with remedies is monitored by the CCA, Department for abuse of a dominant position and often accompanied by the use of monitoring trustees. For example, the revised terms of business must be published by undertaking on its web site throughout the monitoring period, or the undertaking in question has to announce to its customers the application of a new price list and publish it on its website and notify to the CCA of any changes in the price list or signed and stamped Annex of the agreement has to be submitted to the CCA for review within certain period of time, like 30 days after of receiving the CCA's decision. As already mentioned, the monitoring trustee usually submits the report on the implementation of the measures during certain period of time, every three or six months during one or two years.

29. In the case of non-compliance, the CCA may reopen the proceeding against the undertaking where there has been a material change in any of the circumstances on which the commitment decision was based, where the undertakings do not comply with the undertaken commitments or where the decision of the CCA was based on incomplete, incorrect, or misleading information provided by the parties. Where the monitoring procedure with respect to the implementation of the commitments indicates that the undertaking concerned acts contrary to its commitments such behaviour shall constitute an infringement of Competition Act or Article 101 or 102 TFEU and the CCA shall issue a separate infringement decision also imposing the fine for the infringement concerned in line with the provisions of Competition Act.<sup>12</sup>

30. Notwithstanding the fact that it is always good to do self-check including the measures imposed by the competition authority, so far there was no need for further ex post

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<sup>11</sup> More about the case CCA vs. TISAK d.d. and decision of the CCA from 4 February 2016, <https://www.aztn.hr/ea/wp-content/uploads/2016/04/UPI-034-032013-01048.pdf>

<sup>12</sup> Article 49, paragraphs 6 and 7 of the Competition Act.



evaluation of measures by the CCA simply because the undertakings complied with agreed measures and conditions and they restored effective competition quickly.

31. However, in the context of new type of cases, such as potential abuse of dominance cases in digital markets, there might be need to reconsider so far imposed measures and to analyse some possible new types of measures and remedies.

## 5. Final remarks

32. When it comes to use of different remedies especially in the commitment decisions, it can be concluded that it is *win-win* for both undertakings and competition authority. There is no infringement established, no fine imposed and the undertaking gets a second chance to remedy its potentially anti-competitive behaviour on the market. On the other side, the competition authority gets the possibility of faster completing the proceeding and directing its resources to new cases. This is particularly valuable for smaller competition authorities with limited resources, the CCA being one of those authorities. When the undertaking in the early stage of the proceeding voluntarily commits to the implementation of measures and conditions, after careful analysis and market test, the competition authority like CCA in most of the cases estimates that in comparison to a lengthy proceeding, acceptance of the proposed measures would result in a faster reinstatement of competition in the relevant market. However, it should not be forgotten that measures and commitments are not applicable in all competition cases, they are definitely not appropriate in the case of hard-core restrictions such as prohibited agreements between competitors (cartels) or in cases of abuse of dominant position with strong evidence on the abuse which cannot be removed by the application of measures. The trend to use the commitment decisions, sometimes combined with interim measures could be also possible way forward in the digital market cases.