

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

**Cancels & replaces the same document of 4 May 2018**

**Implications of E-commerce for Competition Policy - Note by Croatia**

**6 June 2018**

This document reproduces a written contribution from Croatia submitted for Item 5 of the 129th OECD Competition committee meeting on 6-8 June 2018.

More documents related to this discussion can be found at [www.oecd.org/daf/competition/e-commerce-implications-for-competition-policy.htm](http://www.oecd.org/daf/competition/e-commerce-implications-for-competition-policy.htm)

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## *Croatia*

1. According to some publicly available data, online sales in Croatia in 2017 made up for only 1 percent of the total retail of goods – a number which will certainly rise in the years to come. According to the Eurostat data, most on-line shopping in Croatia is in the department of clothing and footwear (58 percent), followed by technical goods (56 percent), and books (26 percent). The biggest potential for online sales in Croatia are fashion accessories (34 percent), cosmetics (32 percent) and gadgets (29 percent), followed by toys and baby products (26 percent), car equipment (22 percent) and sports equipment (21 percent).

2. In this contribution, Croatian Competition Agency (CCA) presents two cases from its recent practice – both in the market of electrical household appliances – in which it primarily investigated alleged restrictive vertical agreements. It is worth mentioning, that as early as in 2014 the CCA opened a proceeding focused on allegedly restrictive passive sales provisions in the contracts concluded between the manufacturer Gorenje and its distributors engaged in the online sales, in distinction from the traditional brick and mortar shops, but at the same time followed the track of the resale price maintenance (RPM) practices. Interestingly enough, Gorenje was fined for RMP but there were not enough indices that it was engaged in any illegal restriction of passive sales on the internet. In the second case, opened in 2016, it was the CCA who analysed the rebate scheme of BSH providing for a slightly different incentive for e-traders and brick and mortar shops. Since there was no harm for the consumers the case was terminated but it was the CCA who definitely contributed to the new rebate scheme of BSH that equally favours all the operators in the market – on- and offline.

### **1. Gorenje Case: Alleged restrictive agreement – Price and rebate policy – Restriction of passive sales — On-line sales**

3. In 2014 the Croatian Competition Agency (CCA) opened ex-officio proceeding against the undertaking Gorenje Zagreb d.o.o. The infringement proceeding concerned was initiated following a preliminary market investigation in which there had been indices of a possible restriction of passive sales in terms of the rebate and pricing policy and the criteria applied under the standard agreements entered into between Gorenje and the undertakings engaged in online sales, in distinction from the traditional brick and mortar shops, in line with Article 9 paragraph 1 items a) and b) of the Regulation on block exemption granted to certain categories of vertical agreements, OG 37/11 (BER) and Article 8 of the Competition Act.

4. Gorenje Zagreb commented about its business policy and explained that its e-trade business has been in the first-place dependant on a principally slow and limited scope of e-commerce in the sale of all household appliances in Croatia and estimated that it made up for barely 0-5% in the overall sales in 2013. In its opinion it was the nature of these products that contributed to a rather low share in their internet sales, such as its technical features, and, second, the consumers' preferences that indicate that consumers still like to buy these rather expensive products, such as white goods and small household appliances, in traditional retail stores.

5. Furthermore, Gorenje also referred to the EU law, particularly case C-439/09 Pierre Fabre Cosmetique, insisting that it did not commit such an infringement. In addition, it claimed that not all the restrictions at stake are hard core restrictions and that some of them are allowed, which arises from the Guidelines on Vertical Restraints (Guidelines). In line with item 54 of the Guidelines the principal may require quality standards for the use of the internet site to resell its goods, and may, for example, require that its distributors have one or more brick and mortar shops or showrooms as a condition for becoming a member of its distribution system.

6. Gorenje also identified three exceptions from the hard-core restriction set out in Article 4 item (b) of the Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, listed under item 55 of the Guidelines: “All three exceptions allow for the restriction of both active and passive sales. Under the first exception, it is permissible to restrict a wholesaler from selling to end users, which allows a supplier to keep the wholesale and retail level of trade separate. However, that exception does not exclude the possibility that the wholesaler can sell to certain end users, such as bigger end users, while not allowing sales to (all) other end users. The second exception allows a supplier to restrict an appointed distributor in a selective distribution system from selling, at any level of trade, to unauthorised distributors located in any territory where the system is currently operated or where the supplier does not yet sell the contract products (referred to as ‘the territory reserved by the supplier to operate that system’ in Article 4(b)(iii) of the Regulation (EU) No 330/2010. The third exception allows a supplier to restrict a buyer of components, to whom the components are supplied for incorporation, from reselling them to competitors of the supplier.” In the view of Gorenje, these provisions make it clear that no third parties can call on their right to sell on the internet and that certain restrictions may be imposed when e-trade is involved. Gorenje highlighted that its attitude towards internet was not a restrictive one, on the contrary, it suggested that internet sales may have positive effect on its operation. It held the view that its policy on the internet or certain individual opinions may not be understood as official interpretation of Gorenje.

7. In the course of the proceeding the CCA established that the restriction of sales was limited to Gorenje Plus Products. Secondly, it has been established that only one part of the Gorenje product range was involved – the high-quality and high-tech products that have been sold in show-rooms and by exclusive kitchen suppliers. These products have not been sold on the internet by Gorenje itself, and logically enough, it has not involved any other operators to sell them on-line. Thus, in this concrete case it was unlikely that Article 8 of the Competition Act regulating prohibited agreements would be violated.

8. However, it must be noted, that within the same infringement proceeding the CCA took the decision that Gorenje entered into a prohibited agreement containing directly or indirectly restrictive provisions on resale price maintenance (RPM) for white goods and small household appliances of the Gorenje brand. Gorenje was imposed a fine for the infringement concerned.

## **2. BSH Case: Alleged restrictive agreement – Rebate policy – Brick and mortar and on-line sales**

9. In 2016 the Croatian Competition Agency (CCA) opened an infringement proceeding against the undertaking BSH kućanski aparati d.o.o. Zagreb with the objective

of establishing whether certain provisions under the standard rebate agreements that the undertaking BSH household appliances concluded with its buyers (distributors) who sell electrical household appliances in brick and mortar shops or so-called hybrid-traders, represent a prohibited agreement in line with Article 8 of the Competition Act, and put the buyers of the BSH products who sell exclusively on-line in an unfavourable position.

10. The results of the preliminary market investigation showed that under its 2016 Rebate Scheme BSH gave the buyers who sold the products concerned exclusively online lower rebates than the buyers who operated in traditional stores.

11. On the other hand, the so-called hybrid-traders (buyers that were engaged in both traditional and online selling) were given significantly higher rebates in terms of the planned turnover, whereas the exclusively e-traders were given identical rebates regardless of the realized turnover.

12. The 2016 Rebate Scheme comprised 7 categories of buyers depending on their annual turnover, from the highest profile buyers to “small retailers” and “basis promo trade” receivers. At the same time, the rebates also depended on the size of the household appliances. The 2016 Rebate Scheme did not divide the buyers into traditional and online traders, yet, it was apparent from the scheme and the contracts that BSH concluded with its buyers in 2016 that the pure e-traders could get only the “basic promo trade” rebate that in this case did not depend on the planned annual turnover.

13. Based on the submitted agreements and their annexes and the 2016 Rebate Scheme the CCA eventually found that the rebate scheme concerned provided for volume rebates applicable in accordance with the concluded agreements to brick and mortar stores. The very same rebate scheme did not equally apply to exclusively online traders but BSH provided for them identical rebates that did not depend on the planned volumes or planned annual turnover, the so-called “basic promo trade”. In general, the analysis of all the applicable rebates in 2016 revealed that the traders who sold the products concerned exclusively on-line got lower rebates. However, the bonus breakdown indicated that the e-traders at the same time got better bonuses than the traditional and hybrid traders.

14. Within the meaning of the Guidelines on Vertical Restraints item 52 (c) a supplier may impose certain conditions on the distributor selling his product on the internet, such as the visual of the website or the setting up a brick and mortar store within a certain period of time, but it does not permit "dual pricing" which is considered a hardcore restriction. Concretely, where the CCA examined the contracts that BSH concluded with the traders who were engaged in online and offline trade at the same time (hybrid traders), it found that there was no dual pricing involved. If this had been the case, BSH would have give lower rebates for all the products that were sold online, in other words, lower rebates would not have been granted exclusively to the undertakings selling online but also to the hybrid traders who sell both online and offline. In addition, BSH did not refer to the volume of the products sold online but explained how it granted off-invoice rebates to online household appliances distributors whereas all other partners, that provided showroom presentations and pre-sales services linked with the product concerned, were eligible to a certain share of additional rebate for the services they provided for end users. This difference was partially levelled by the bonus system that to certain extent favoured the exclusively online traders.

15. BSH changed its 2017 Rebate Scheme by revoking the special rebate for exclusively online traders. In short, the new rebate scheme allows for equal rebates

regardless of the fact whether the trader is engaged solely in the internet trade, or brick and mortar selling or a combination of these (hybrid traders).

16. Despite the fact that the data collected in the preliminary market investigation were understood as sufficient indices to open the infringement proceeding, in the course of the proceeding it was established that BSH did not implement dual pricing practices, which are considered a hardcore restriction. It was also established that no apparent harm was inflicted on end consumers in terms of prices given the fact that at that time the internet stores had more or less equal or lower prices for electrical household appliances supplied by BSH than traditional brick and mortar shops and hybrid traders. Therefore, the CCA terminated the proceeding.