

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

**Competition Issues in Labour Markets – Note by Croatia**

**5 June 2019**

This document reproduces a written contribution from Croatia submitted for Item 4 of the 131<sup>st</sup> OECD Competition committee meeting on 5-7 June 2019.

More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm>

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## *Croatia*

### **1. CCA vs. Gemicro d.o.o., Zagreb**

1. On 31 June 2014 the Croatian Competition Agency (CCA) received a complaint by the undertaking Modulus informacijske tehnologije d.o.o., relating to the behaviour of the undertaking Gemicro d.o.o. In the sense of Article 37 of the Competition Act (OG 79/09 and 80/13) this complaint was considered the initiative to open a proceeding. The complainant basically stated that it came to the knowledge that the undertaking Gemicro, active on the market in the provision of specialised IT support to companies dealing with leasing and other forms of financing, made the conclusion of contracts subject to acceptance of supplementary obligations by the users of its services, concretely, by prohibiting the parties to the agreement to hire the former employees of Gemicro, who are now employed in other firms who are competing undertakings of Gemicro.

2. In order to establish whether in this concrete case there was enough circumstantial evidence to start a proceeding establishing the alleged prevention, restriction or distortion of competition within the meaning of Article 38 paragraphs 1 and 3 and Article 39 of the Competition Act the CCA carried out a preliminary market investigation in the sense of its competences under Article 32 point 1 line a) of the Competition Act and requested comments and necessary documentation from the leasing companies concerned and the undertakings Gemicro and additionally from Modulus.

3. The documentation that has been communicated to the CCA contained the contracts that had been entered into between Gemicro and the leasing companies. These contracts contained an almost identical provision on the basis of which the parties agreed not to hire or engage any employees that have been working for either party at any time during the life-time of the agreement.

4. Given the sufficient indices that Gemicro holds a dominant position in the relevant market (provision of specialised IT support to leasing companies, particularly involving implementation and maintenance of specialized business software necessary for the work of leasing companies in the territory of the Republic of Croatia), with no significant competitors and/or holding significant market power relating to actual or potential competitors, and taking into consideration the above mentioned restrictive provision contained in the contracts at issue, the CCA opened a proceeding against the undertaking Gemicro within the meaning of Article 13 of the Competition Act.

5. Soon after the CCA opened the proceeding within the meaning of Article 49 of the Competition Act Gemicro proposed to delete the provision concerned from all the concluded contracts with leasing companies, concretely, it committed itself to draw an annex to the contracts stating that this provision is being deleted from the framework agreement and committed itself to restrain from including such a provision in its future contracts.

6. Within the meaning of Article 49 paragraph 2 of the Competition Act the CCA found the proposed commitments sufficient to remove the anticompetitive effects and to restore competition in the relevant market. The commitments were proposed at an early stage of the proceeding whereas all the leasing companies that are Gemicro's buyers explicitly noted in their statements that they did not refuse to do business with other

undertakings. The proposed commitments were accepted also on the account of the fact that the provision concerned could not involve a lot of undertakings, given the fact that in the last five years Gemicro terminated the employment contracts for only three employees.

7. In line with Article 49 paragraph 3 the CCA set the deadlines for the fulfilment of the commitments on the part of Gemicro. After Gemicro provided the CCA with evidence of the fulfilment of the commitments concerned in the specified time period there have been no legal grounds to carry out the proceeding against this undertaking.

## 2. CCA vs. KOIOS savjetovanje d.o.o., Zagreb

8. Upon the complaint filed by the undertaking BILOG d.o.o. from Zagreb the Croatian Competition Agency (CCA) assessed the agreement entered into between the undertakings BILOG and KOIOS that contained a no-poach clause. Under the No-poaching Agreement concerned both parties agreed not to poach, solicitate or invite to hire employees indirectly, through third parties, neither natural nor legal persons, regardless of the legal connectedness with the third parties concerned, or in any way encourage the employees of the other party that they have established contacts with during the implementation of the Agreement to leave their jobs at the other party without a prior written approval.

9. In the sense of competition rules, the no-poaching provisions have a similar effect as the non-compete provisions. Therefore, they should be assessed in the similar way. Taking into consideration the nature of the provisions of the Agreement in question, the objectives it aims to achieve and the economic and legal context, the CCA found that the restriction concerned under Article 14 of the No-poaching agreement is directly linked with the implementation of the Agreement and the provision of the IT and consultancy services. It must be noted that the no-poach restriction included only the employees of the other party that the complainant and KOIOS established contacts with in the course of the implementation of the Agreement, and not all the employees of the other party.

10. Both the complainant and the undertaking KOIOS are active in the provision of IT services, where demand is high and supply limited in terms of labour force. At the same time, the relevant market concerned shows high daily fluctuations of the labour force switching from one employer providing the same services to another. Job-hopping is present on the basis of the labour agreement, cooperation agreements or temporary arrangements with natural persons who provide these services.

11. In this concrete case, and taking into account the agreed way in which the services are provided by KOIOS to the complainant, the nature of the services specified under the Agreement, the service providers and the nature of the functioning of the market concerned, there is a risk that the Agreement in question could not be implemented or continued, if the complainant or KOIOS would poach, solicit or encourage to hire employees, or in any way encourage the employees that they established contacts with in the course of the implementation of the Agreement, to quit their job at the other party to the agreement, without a prior written approval of the other party to the agreement.

12. In line with Article 74 of the Croatian Competition Act, in the case of legal voids and uncertainties relating to the interpretation of competition rules, the CCA accordingly applies the criteria arising from the application of the competition rules applicable in the European Union, and particularly the references to the case law of the Court of Justice of the European Union.

13. That being said, the CCA found that the Agreement entered into between the undertakings BILOG and KOIOS that contained a no-poach clause in Article 14 thereof represents an ancillary restriction of competition – a restriction which is closely connected, objectively necessary for the main operation and proportionate to the underlying objectives of that operation. In this particular case, the five major parts of the Agreement were not relating to their objective and effect anticompetitive. Consequently, the clause in question could not be found restrictive and as such prohibited in the sense of Article 8 paragraph 1 of the Competition Act.