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**Case Prioritisation and Prosecutorial Discretion – Note by Croatia**

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## Croatia

### Introduction

1. In the work of competition authority there is the eternal quest for balance between the wish to solve all received initiatives and claims and the available resources. Hence, there is the need to prioritise, especially for small authorities with limited resources focusing on the cases that could uncover, prove, and sanction hard core infringements of competition law causing the biggest harm to competition, economy and society. Besides the mentioned two main reasons for prioritization, third reason, why it is important to have priorities is to focus on those sectors that merit the most attention because of their impact on consumers and because of their potential to affect the markets. At the same time, the prioritization should not loose from the sight planning of market studies or sector inquiries and competition advocacy activities which also have to be aligned with priorities. Final, but not less significant is the reason of transparency for stakeholders to see in which sectors or types of cases the competition authority is focusing its attention and resources, and which criteria does it apply. This paper will look at mentioned reasons for adopting and applying priorities with emphasis on relation between discretion and prioritisation, legal certainty, transparency and limitations of applying priorities with examples and experience from Croatian Competition Agency.

### 1. The balance between discretion and prioritisation

2. National competition authorities (further: NCAs) due to their independent status and specific competences have certain degrees of discretion in their work implementing competition rules. Most NCAs are at the same time administrative bodies, investigating bodies, regulators and prosecutors. From that perspective, it is important to give them certain discretion in performing their powers effectively but it is as equally important to have solid legal regulation of those powers in respective laws, regulations and guidelines. The Croatian Competition Agency (further: CCA) is a stand-alone and independent legal person with public authority which, as a general, national regulatory authority in charge of competition in all markets, performs the activities within its scope and powers regulated by this Act and Articles 101 and/or 102 TFEU, the Council Regulation (EC) No 1/2003 and the Council Regulation (EC) No 139/2004.<sup>1</sup> The CCA exercises its powers independently impartially and in the common interest of the effective enforcement of Competition Act and Articles 101 and/or 102 TFEU. Any form of influence on the work of the CCA which could impede its independence and autonomy is prohibited. These provisions clearly ensure independence of the competition authority. Furthermore, the CCA identifies the infringement of Competition Act or/and Articles 101 and 102 TFEU in administrative proceeding and imposes fines and periodic penalty payments for the infringements found. In conducting the proceedings, it uses certain investigatory powers and instruments, such as requests for information, interviews, surprise inspections. Thus, the CCA has the roles of administrative body and the prosecutor. Regulatory role comes from its ability to regulate all markets by implementation of competition rules, merger control, by its sector inquiries and by participating in preparation of regulations in competition field. In order to

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<sup>1</sup> Article 26, Croatian Competition Act, available at: <https://www.aztn.hr/ea/wp-content/uploads/2023/02/COMPETITION-ACT-2021-consolidated-241122-ENG.pdf>

effectively use its powers with certain degree of discretion and not to lose itself from overwhelming number of cases, it is necessary to adopt priorities. Priorities direct the work towards certain cases such as old cases, case with hard core restrictions of competition and sectors defined. Discretionary power ensure that those priority cases are completed in the manner best fit to each particular case. The optimal level of those two significant elements, discretion and priorities would depend on the institutional capacity. Some bigger NCAs with unlimited resources can have more discretion in choosing its cases, including new type of cases (digital, sustainability cases, no-poche agreements etc.), building new innovative investigatory tools (for example, algorithms, AI tools) or using external expertise. Regardless of the size of the NCA, it is crucial to have legal certainty when defining its priorities and using its discretionary powers towards the parties.

## 2. Legal certainty issue: guidelines with criteria for prioritisation from the CCA

3. The power to freely set priorities derives from the law, the CCA is empowered to set the priorities in its work also where it receives the initiative for the initiation of an ex officio proceeding within the meaning of Competition Act and Articles 101 and/or 102 TFEU.<sup>2</sup> However, this power from the law should not be used arbitrarily without at least some guidance on what constitutes priorities and when the NCA can reject the complaint or initiative based on the lack of priorities. In order to comply with the requirement of ensuring legal certainty, the CCA in 2024 adopted Internal Guidelines on setting of priorities.<sup>3</sup> The purpose of applying the priority policy is to make efficient, economical and rational use of the CCA's resources in dealing with received initiatives and other submissions, while ensuring effective competition, and directing resources to the most serious infringements of competition law that cause the greatest harm to competition, the economy and the well-being of consumers. The Guidelines firstly determine what will CCA take into account when deciding on prioritization. When determining priorities, the CCA will take into account the actions of undertakings on the market, especially those that significantly and to a large extent affect the prevention, restriction and distortion of competition. Furthermore, it will take into account in particular the hardcore restrictions of competition that cause the greatest harm to competitors on the market, the economy and consumers (such as price fixing, imposition of unfair prices or trading conditions, limitation of production, markets or sales, sharing of markets or customers etc.). The Guidelines then define several main criteria relevant for the CCA to decide that the initiative or other submission will not be considered a priority in the implementation of the Competition Act and articles 101 or 102 of the TFEU. Those criteria include: a) facts and circumstances that have already been the subject of a legal and/or economic analysis, or a previous examination of the situation on the relevant market conducted by the CCA in 2 of the previous 5 years, and the content of the initiative or the second submission does not indicate that these are new and/or different facts and circumstances, b) data that are obviously untrue and/or misleading, c) facts and circumstances that relate to an uncertain or hypothetical case or conduct of an entrepreneur that has not yet occurred. The CCA will as a rule implement the criteria from the Guidelines immediately after receiving the initiative or other submission taking into account their content with regard to:

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<sup>2</sup> Article 26, paragraph 4, Croatian Competition Act; Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019 (ECN+Directive), Article 4, paragraph 5.

<sup>3</sup> [https://www.aztn.hr/ea/wp-content/uploads//2024/05/Pravilnik-o-prioritetima\\_2.pdf](https://www.aztn.hr/ea/wp-content/uploads//2024/05/Pravilnik-o-prioritetima_2.pdf)

1. the facts and circumstances stated in the initiative or other submission,
  2. the gravity and duration of the alleged violation,
  3. the economic impact of the alleged violation,
  4. the impact on consumers,
  5. the possibility of legal protection before other authorities
  6. the scope of the economic activity to which the initiative or other submission refers.
4. In the event of a need to determine additional facts and circumstances, the CCA may collect data and information from legal or natural persons, professional or economic interest associations, or chambers of commerce, consumer associations, state administration bodies, and bodies of local and regional self-government units that have certain knowledge that is important for determining the situation on individual markets. If it assesses that the initiative is not a priority in the implementation of the Competition Act and Articles 101 or 102 TFEU, the CCA will issue a decision establishing that there is no public interest in initiating the procedure and deliver it to the applicant of the initiative. In the explanation of the decision, the CCA will state which criteria from the Guidelines it applied when making the decision.

### 3. Transparency and prioritisation

5. Transparency in the work of any public institutions is crucial, the public has to be informed about its activities, decisions and plans. The CCA retains high degree of transparency by publishing all its decisions, opinions, annual reports, programs, results of sector inquiries, press releases, expert articles, interviews etc. To that end, the priorities of the NCAs are also published on its website. The CCA started publishing its priorities in 2024 but also prior to that, they existed but they were mostly incorporated in work programs (also available on the CCA's web site). The publishing of priorities is a good practice in line with respecting two important principles, legal certainty and transparency. Mentioned Internal Guidelines on setting of priorities are also published on the web site. Individual cases influence the priorities setting to a certain extent because they point to which sectors or behaviours should the NCAs turn their attention. On the other hand, priorities should also include market studies/sector inquiries following the trends, changes or disturbances on certain markets as well as competition advocacy activities. Looking at example of priorities of the CCA for 2025 and 2026, two things can be observed, one, the general priorities remain the same, efficient implementation of Competition Act and Articles 101 and 102 TFEU, fight against hard core restrictions of competition rules, such as cartels, especially bid rigging, abuse of a dominant position followed by regular merger control, active advocacy and international cooperation. Second thing that can be observed, the sectors defined as priority sectors are those with greatest impact on consumer welfare and practices that have the strongest impact on the development of competition, innovation, productivity, and market resilience. Hence, in 2025, those sectors were:

- *Grocery retail market* (food, beverages, toiletries and household supplies), the CCA has been monitoring the grocery market through sector investigations under the Competition Act, and by enforcing the Act on the prohibition of unfair trading practices in the business-to-business food supply chain (UTPs Act);
- *Electronic Communications*-considering that cases often occur in the electronic communications sector, the CCA continues to focus on the market situation in this

sector, examining prohibited agreements and abuse of a dominant position by the actors in the telecommunications market;

- *Energy Sector*-recognizing the significance of the energy sector for the Croatian economy, state budget, and consumer welfare, the CCA is intensifying its scrutiny of market relations and take a comprehensive approach to identifying potential anti-competitive practices.<sup>4</sup>

6. Similarly, for 2026, the general priorities are the same, two sectors are added in priority sectors, construction sector due to potential prohibited agreements in this sector and digital platforms for provision of taxi services considering importance and dynamic growth of this sector and several complaints received.<sup>5</sup>

#### 4. Limits of prioritisation

7. The main limitation comes from legislation which although giving the possibility to prioritize, requires from the NCAs as public bodies to reply to all questions received and to adopt decisions or to forward the issue to another relevant institution. In that respect, there is some reluctance to use the priority option for rejection of initiatives due to public administration role of the NCA. Another limitation is that the NCAs has to retain certain flexibility in work because there might be potential case in the sector which was not defined among priorities but still deserves attention and focus of its resources. This means that it is necessary to react on potential distortions on the market and not be constrained by set priorities. In that respect, the priorities should be considered as a direction but not as a final destination for each year. Another point is that setting of priorities have to be done on all levels of internal structure. This means that the president of the Council together with Council members sets general priorities in the work of the CCA for each year and then the directors and heads of departments have to set their priorities in solving the cases accordingly, again with certain flexibility. The older cases, the cases with dawn raids or the cases in final stages of procedure are usually picked as a priority ones compared to completely new cases.

#### 5. Conclusion

8. Adopting priorities is a very good instrument of the NCAs because it gives them the opportunity to focus on more relevant cases and to more efficiently direct their resources. In doing so, the CCA follows two important principles, legal certainty and transparency. The power to freely set priorities derives from the law, the CCA is empowered to set the priorities in its work also where it receives the initiative for the initiation of an ex officio proceeding. However, this power from the law has to be followed by some legal guidance on what constitutes priorities and when the CCA can reject the complaint or initiative based on the lack of priorities. By publishing of priorities for each year the principle of transparency is respected. The prioritization should be done on all levels of structure with certain level of flexibility to adjust to the potential cases in the sector which was not defined among priorities but still deserves attention and focus of its resources.

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<sup>4</sup> <https://www.aztn.hr/en/prioriteti-aztn-a-za-2025-godinu/>

<sup>5</sup> <https://www.aztn.hr/ea/wp-content/uploads/2026/04/PRIORITETI-AZTN-2026-2.pdf>