Organisation for Economic Co-operation and Development

DAF/COMP/WP3/WD(2019)7

Unclassified

English - Or. English

6 May 2019

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 3 on Co-operation and Enforcement

The standard of review by courts in competition cases – Note by Croatia

4 June 2019

This document reproduces a written contribution from Croatia submitted for Item 2 of the 129th OECD Working Party 3 meeting on 4 June 2019.

More documents related to this discussion can be found at

http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm

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JT03447139

Croatia

1. Administrative Court of the Republic of Croatia reviews both the legality and the merits of the decision of the Croatian Competition Agency (CCA) and decides on the level of fines imposed by the CCA for infringements of competition rules. Under the previous regime before the currently valid 2009 Competition Act, infringements of competition rules were treated as minor offences where the CCA has merely established the presence of the infringement and a minor offence court decided on the penalty level.

2. Judicial review is described in the Articles 67, 68 and 69 of the Croatian Competition Act:

Article 67

(1) Against the decisions of the Agency which establish the infringements of this Act and impose fines, and against the decisions by which the proceeding is terminated on the account of dealing with the preliminary issue, no appeal is allowed but the injured party may bring a claim before the Administrative Court of the Republic of Croatia within 30 days from the receipt of the decision. The claim shall be decided over by a panel of 3 judges concerning the following points of the decision concerned:

1.misapplication or erroneous application of substantive provisions of competition law;

2.manifest errors in application of procedural provisions;

3.incorrect or incomplete facts of the case;

4.inappropriate fine and other issues contained in the decisions of the Agency.

(2) Against the procedural orders adopted by the Agency during the proceedings, no appeal is allowed but the injured party may bring a claim before the Administrative Court of the Republic of Croatia.

(3) By way of derogation from paragraph (2) of this Article, against the procedural order by which the proceedings are initiated (Article 39), the procedural order on the basis of which the Agency decides to initiate one single procedure against two or more independent undertakings in the case where rights and/or obligations are based on the same or similar facts of the case and on the same legal basis, the procedural order on the basis of which the request for access to files or a part thereof has been denied (Article 47) and the procedural order by which the Agency joins two or more new notifications of a concentration previously notified by one and the same undertaking and conducts a joint assessment proceeding(Article 21 paragraph (7)) no appeal and no claim at the Administrative Court of the Republic of Croatia is allowed.

(4) The claim referred to under paragraph (1) of this Article postpones the enforcement of the decision of the Agency.

(5) Against the decision of the Agency establishing an infringement of this Act and imposing a fine for the committed infringement referred to under paragraph (1) hereof a claim may be filed by the injured party to the proceedings, whereas against the decision of the Agency establishing that no infringement of competition rules

within the meaning of this Act has been committed a claim may be filed also by a person who filed the initiative and the person who has been granted the same procedural rights which are enjoyed by the person who filed the initiative as referred to in Article 36 paragraphs (3) and (4).

Article 68

(1) The panel of judges of the Administrative Court of the Republic of Croatia shall discuss and decide on the basis of the facts presented in evidence during the proceedings.

(2) The plaintiff may not present new facts in evidence but he/she may propose new evidence relating to the facts which had been presented in evidence during the proceeding. (3) New facts may be presented only under the condition that the plaintiff provides evidence that he/she did not have or could not have had knowledge of these facts during the proceeding.

Article 69

(1) All actions brought before the Administrative Court of the Republic of Croatia pursuant to this Act are urgent. (2) Damages claims relating to the infringements of this Act shall fall under the competence of the relevant commercial courts.

3. During 2018 the High Administrative Court of the Republic of Croatia issued three judgments in relation to the decisions of the Agency (confirming the claim), while one claim was withdrawn.

4. Among the appealable acts are also commitment decisions: each party that proves a legal interest, may file a claim against the commitment decision before the High Administrative Court. Commitments (measures and obligations within a certain deadline), undertaken by the undertakings to restore efficient competition in the market, are a common instrument in the practice of the CCA. They swiftly and effectively restore competition in the relevant market, whereas lengthy infringement proceedings and fines for undertakings involved are thereby avoided. Where appropriate, the CCA accepts the remedies that are voluntarily offered by the undertakings and that eliminate possible anticompetitive effects; there is no infringement within the meaning of the Competition Act, no sanctions for undertakings and no costs for the CCA and the State Budget.

5. Although the judicial review has only one instance, as of late there is a new trend for the injured parties to turn to the Constitutional Court of the Republic of Croatia. Seized with such claims, Constitutional Court decides on the merits of the case (one recent example where the Constitutional Court confirmed the claim of the party and abolished the judgement of the High Administrative Court and CCA's decision in a 2015 cartel case).

6. Here below is a recent example of a lengthy judicial process which included arbitration.

7. Pursuant to the bilateral agreements on the protection of investment entered into between Croatia and the states of origin of the investors, certain investors brought the dispute to the arbitral tribunal of the International Centre for Settlement of Investment Disputes (ICSID).

8. In February 2015 Bankcroft Group, a private equity investment company, commenced an international arbitration against the Republic of Croatia pursuant to the bilateral Agreement on the encouragement and reciprocal protection of investments between the Republic of Croatia and the Kingdom of the Netherlands. The arbitration was

commenced at the ICSID by its Dutch subsidiary B3 Croatian Courier Cooperatief U.A. (hereinafter referred to as: claimant), the owner of the Croatian company CityEX.

9. The subject of the case was the provision of postal services in Croatia until 2015 – which was the period of liberalisation in the provision of postal services, whereas the claimant also challenged the conduct of the relevant Croatian authorities in the case concerned. The claimant put forward the alleged serious misconduct of the Croatian authorities engaged in the case at the same time claiming that the final bankruptcy of CityEX was the consequence of the predatory pricing practices of the national postal operator Hrvatska pošta and its services, that, in the opinion of the claimant, had not been adequately scrutinized by the relevant Croatian national authorities, which consequently made CityEX subject to bankruptcy proceeding.

10. In the arbitral proceeding the Republic of Croatia, supported by the expertise of the Croatian Competition Agency, contested the claim of the claimant in its entirety.

11. On 5 April 2019 the arbitral tribunal made the arbitral award rejecting the majority of the claimant's requests including the request for payment of the damages. In dismissing the majority of the claimant's requests the arbitral tribunal also dismissed the main allegations of the claimant referring to the predatory pricing policy.

12. Following the ruling of the European Court of Justice (ECJ) of March 2018, in accordance to which bilateral agreements on protection of investments between Member States that contain the arbitration clause i.e. provide for arbitration in the dispute settlement between the Member States, are incompatible with the EU Treaties, all Member States committed themselves to terminate these agreements. The ECJ ruling was made with respect to the claim of Achmea, the Dutch insurance company against Slovakia.