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

## **Working Party No. 3 on Co-operation and Enforcement**

### **Criminalisation of cartels and bid rigging conspiracies – Note by Croatia**

9 June 2020

This document reproduces a written contribution from Croatia submitted for Item 1 of the 131<sup>st</sup> OECD Working Party 3 meeting on 9 June 2020.  
More documents related to this discussion can be found at  
<http://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm>

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## *Croatia*

1. Cartels are, by definition in Croatian legal system, secret and prohibited horizontal agreements entered into between two or more independent undertakings, or decisions by associations of undertakings or concerted practices of undertakings at the same level of production or distribution chain, which have as their object distortion of competition between competitors, whereas cartel members may agree on such matters as purchase or sale prices, allocation of markets allocation of customers, limit total industry output and/or sales and technological development, bid-rigging and similar, which harm the consumers through higher prices and less choice of goods and/or services.
2. Cartels-prohibited agreements are considered as hard core breach of the competition law and as the most severe breach of the competition law. There are no exceptions to the ban on hardcore cartels.
3. The Competition Act contains an entire section that refers to the imposition of fines – penalty clause section and is related to the administrative fines only.
4. The proceeding before the Competition Agency is administrative and the Agency can impose fines for cartels.
5. Administrative fines are determined by the Agency. A fine not exceeding 10 % of the total turnover of the undertaking realized in the last year for which financial statements have been completed shall be imposed on the undertaking who concludes a prohibited agreement or participates in any other way in the agreement that resulted in distortion of competition in the sense of Article 8 of the Competition Act or Article 101 of the TFEU. Fines can be imposed on undertakings and associations of undertakings.
6. Representatives of undertakings cannot be fined.
7. Criteria for determining the amount of the fine is set in the Competition Act and in more details in the Regulation on the method of setting fines. Article 64 of the Competition Act states the following:

### **Method for the setting of fines**

8. When setting the fine the Agency shall take fully into account all mitigating and aggravating circumstances, such as the degree of gravity of the infringement, the duration of the infringement and the damage caused for competing undertakings and consumers. The Agency will use the following two-step methodology when setting the fine:
9. first, it will determine a basic amount for each undertaking; second, it shall adjust that basic amount upwards or downwards depending on the mitigating and/or aggravating circumstances in each particular case.
10. The basic amount of the fine will be determined and set at a level of up to 30 % of the undertaking's turnover generated exclusively from the activity of the undertaking carried out in the relevant market where the infringement was committed. The amount determined on the basis of turnover will be multiplied by the number of years of participation in the infringement of Competition Act. The Agency will then take into account circumstances, aggravating or mitigating, that respectively result in an increase or decrease in the basic amount as previously determined.
11. **Mitigating circumstances** shall be considered in particular:

1. where the undertaking concerned provides evidence that it terminated the infringement urgently, as soon as the Agency initiated the proceedings. By way of exception, this will not apply to cartel agreements;
  2. where the undertaking provides evidence that the infringement has been committed as a result of negligence;
  3. where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market;
  4. where the undertaking concerned has effectively cooperated with the Agency outside the scope of the criteria for granting immunity from and reduction of fines.
12. **Aggravating circumstances** shall be considered in particular:
1. where an undertaking continues the same actions or repeats the same or a similar infringement within the provisions of Competition Act, after the Agency has made a finding that it infringed the provisions of Competition Act. In such cases the basic amount shall be increased by up to 100 % for each such infringement established;
  2. refusal to cooperate with or obstruction of the Agency in carrying out its investigations;
  3. role of leader in, or instigator of the infringement and all other steps taken to coerce other undertakings to participate in the infringement of Competition Act.
13. The Agency may also increase the fine in order to exceed the amount of gains improperly made as a result of the infringement of Competition Act, where it is possible to estimate that amount.
14. By way of derogation, the Agency may, upon request and evidence furnished by the undertaking concerned grant a further reduction of the fine. A further reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in Competition Act would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value, given its unfavourable financial position before the fine for the infringement of competition rules has been imposed by the Agency. In the case mentioned under paragraph (7) of this Article and in similar cases where no significant impediment of competition has been established or where the infringement did not have negative effects on competition, the Agency may, in such cases, impose a symbolic fine. Yet, the justification for imposing such a fine should be given in its decision.
15. According to the Croatian Criminal Act there are no criminal sanctions envisaged for cartel activities. Only exception is bid-rigging that is determined as criminal offence in Criminal Act. The Criminal Act prescribes prison penalties for responsible natural person in the undertaking submitting an offer in public procurement process knowing that such offer is based on bid-rigging.
16. In that case, public prosecutor is in charge of the criminal investigation.
17. In the Croatian Criminal Act bid-rigging cases are mentioned in relation to the misuse of public procurement procedures.
18. It clearly states that whoever submits as part of a public procurement procedure a bid based on a prohibited agreement between economic entities, the aim of which is that the contracting authority accepts a certain bid shall be punished by imprisonment from six months to five years.

19. If as a result of the criminal offence a considerable material gain is acquired or considerable damage caused, the perpetrator shall be punished by imprisonment from one to ten years.
20. The undertaking who prevents of his or her own free will the contracting authority from accepting the bid may have his or her punishment remitted.
21. That means that an undertaking coming forward with evidence of cartel activity might not only gain immunity from fine but may be released from criminal punishment as well.
22. The immunity from administrative fines imposed by competition authority is possible regardless of whether the bid-rigging cartel was successfully implemented, while release from criminal sanctions can be granted only in case where the bid-rigging cartel was prevented from being successfully implemented by the defendant himself.
23. It is up to the Criminal Court to impose fine and it may sentence liable person to up to 10 year in prison.
24. The imposition of fines under the provisions of Croatian Competition Act is without prejudice to criminal liability of the person who has been imposed a fine.
25. So far there were no criminal cases related to bid-rigging in Croatia and some leniency based cases are ongoing.