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

**The Future of Effective Leniency Programmes – Note by Croatia**

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This document reproduces a written contribution from Croatia submitted for Item 5 of the 137th meeting of Working Party 3 on 13 June 2023.

More documents related to this discussion can be found at  
<https://www.oecd.org/competition/the-future-of-effective-lenency-programmes-advancing-detection-and-deterrence-of-cartels.htm>

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## *Croatia*

### **1. Introduction**

1. This contribution describes the relevant elements of the leniency program applied by the Croatian Competition Agency (hereinafter: CCA) since 2010, with its focus on several challenges and changes that have been introduced to improve the implementation of the leniency program by the revision of the Croatian Competition Act in April 2021, as well as a review of new legal mechanisms that have been incorporated into the Croatian legislative framework.

### **2. Reform of leniency program in Croatia - main challenges and solutions for better use of leniency program**

2. The leniency program was introduced in Croatia by the 2009 Competition Act and further elaborated by the ancillary provisions of the Regulation on the immunity from fines and reduction of fines adopted in 2010 and revised in 2011.

3. In April 2021, the Revised Competition Act 2021 transposed the 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 (ECN+ Directive). The said Directive also provides some new terms and mechanisms related to the leniency program.

#### **2.1. The characteristics of Croatian leniency program**

4. The Croatian leniency program includes both immunity from fines and reduction of fines. Immunity from fines is an exemption from fines that would otherwise be imposed by the competition authority on an undertaking for its participation in a secret cartel, in order to reward it for its cooperation with the competition authority in the framework of a leniency programme.

5. First, it is necessary to distinguish between the concept of a leniency applicant and an anonymous whistle blower. The element of involvement in the cartel is important for differentiation, in other words, in order for someone to be included in the leniency program, they must be actively involved in the cartel, while an anonymous whistle-blower does not have to be an active member of a cartel.

6. The leniency program means a program concerning the application of Article 101 TFEU or a corresponding provision under the Croatian Competition Act regulating restrictive agreement, that gives a participant to a secret cartel the opportunity to disclose, on a confidential basis, their participation in a cartel and cooperate with the Commission or the CCA during an investigation. The leniency applicant will self-report and hand over evidence, regarding that participant's knowledge of, and their role in the cartel, in return for which by the decision of the competition authority they will receive either total immunity from fines or a reduction from the fines which the Commission or the CCA would have otherwise imposed on them.

7. Under the Revised Competition Act 2021 “leniency applicant” means an undertaking a member of a cartel that applies to a competition authority for immunity from, or a reduction of, fines under a leniency program.

8. The CCA can grant immunity from fine to a member of a cartel or a secret cartel that is the first to come forward and informs the CCA on the existence of a cartel or a secret cartel and submits information, facts and evidence that at the time the CCA receives the application, enables the CCA to open the proceeding and to carry out a targeted inspection in connection with the secret cartel, provided that the CCA did not yet have in its possession sufficient evidence to detect such an infringement and that no other undertaking previously qualified for immunity from fines in relation to that secret cartel. The applicants can submit leniency statements in the form of full or summary applications.

9. However, not all undertakings are eligible for immunity from fines. Immunity from fines cannot be applied to undertakings that have taken steps to coerce other undertakings to join a cartel or a secret cartel or to remain in it.

## **2.2. Reduction in fines in Croatian leniency program**

10. In relation to the reduction of fine, the Revised Competition Act 2021 provides that the CCA can grant a reduction of fine to an undertaking participating in a cartel or a secret cartel that does not qualify for immunity from fines, but who submits compelling evidence of the alleged secret cartel which represents significant added value for the purpose of proving an infringement covered by the leniency program, relative to the evidence already in the CCA's possession at the time of the application.

## **2.3. Summary applications**

11. The applicants who have submitted an application for immunity from or reduction of fines to the European Commission in respect of an alleged secret cartel can submit summary or short-form application for immunity from or reduction of fines to the CCA in respect of that same cartel, provided that the European Commission request covers the territories of more than three Member States as affected territories.

12. The summary or short-form application contains only certain limited information about the alleged cartel, after a full leniency application relating to the same alleged cartel has already been submitted to the European Commission. This in no way rules out the possibility of the applicant to subsequently submit more detailed information. When the European Commission informs the CCA that it has no intention to take over the case, the applicant is given the opportunity to submit a full application to CCA. If the applicant submits a full application within the time limit set by the CCA, the full application is deemed to have been submitted at the time of the submission of the summary application, provided that the summary application covers the same products and areas affected and the same duration of the alleged secret cartel as the full application submitted to European Commission. In Croatia, summary applications were introduced in the amended Regulation on immunity from fines and reduction of fines 2017. It is expected that these provisions will be further revised in compliance with the ECN+ Directive.

## **2.4. Criminal liability and leniency for natural persons**

13. In line with the ECN+ Directive, the Revised Competition Act 2021 has for the first time defined a set of specific conditions under which current and former directors, managers and other members of staff of applicants for immunity from fines under the leniency program would not be imposed a fine in the administrative proceeding and administrative dispute in relation to their involvement in a restrictive horizontal agreement – cartel or a secret cartel covered by the application for immunity.

14. However, the decision about the criminal prosecution against the natural persons referred to above is made by the State Attorney in line with the provisions of the criminal law of the Republic of Croatia.

15. That is to say, the CCA imposes fines in administrative proceedings for cartels only on legal persons – undertakings and the current Revised Competition Act 2021 does not provide for liability of natural persons. On the other hand, the Croatian Criminal Code provides for criminal prosecution in the area of competition where the criminal offense concerned is described as “abuse of competition in the public procurement procedure”.

16. Given the fact that the Revised Competition Act 2021, in line with the Croatian legislative regime described above, place does not provide for sanctioning i.e., imposition of fines on natural persons within legal persons, the provisions of the ECN+ Directive dealing with immunity from and reduction of fines remain apparently inapplicable. This discrepancy in the legal regimes in the matter concerned in many Member States pose a challenge for law enforcement and apparently will be dealt with in the future. This is the case in many Member States, particularly those that, like Croatia, fail to provide for criminal sanctions for natural persons in competition cases.

17. While the criminal prosecution against the natural persons for their involvement in a cartel under specified circumstances is not made by the CCA, but by the State Attorney that can also decide not to press criminal charges or propose to the competent court to mitigate the sanctions, it will be necessary to look for solutions in the criminal law, where competition regime could serve as a support providing cooperation between the CCA and the State Attorney's Office in the matters concerned.

## 2.5. Access to leniency statements

18. Leniency statement is an oral or written presentation voluntarily provided by, or on behalf of an undertaking to a competition authority or a record thereof, describing the involvement and the knowledge of that undertaking in a cartel, and describing its role therein, which presentation was drawn up specifically for submission to the competition authority with a view to obtaining immunity from, or a reduction of fines under a leniency programme, not including evidence that exists irrespective of the enforcement proceedings, whether or not such information is in the file of a competition authority, namely pre-existing information.

19. The Revised Competition Act 2021 provides for the CCA to grant access to leniency statements or settlement submissions exclusively to the parties to the proceeding related to the leniency statements and settlement submissions concerned, exclusively to be able to exercise their rights of defence in the proceeding concerned.

20. The party in the proceeding falling under the authority of the CCA that obtained information in leniency statements and settlement submissions through access to the file may only use information taken from leniency statements and settlement submissions where necessary to exercise their rights of defence in proceedings before the High Administrative Court of the Republic of Croatia in cases that are directly related to the case for which access has been granted, and only in certain situations.

21. The information obtained by the party during enforcement proceedings before the CCA cannot be used by that party in the proceeding before the High Administrative Court of the Republic of Croatia, before the CCA has closed its enforcement proceeding with respect to all parties under investigation by adopting a decision.

## 2.6. Number of leniency applications

22. Since the beginning of the implementation of the leniency program in practice there have been only two leniency applications received by the CCA, both in the same cartel case which is still pending. The first leniency application enabled the CCA to open the case and the second leniency applicant approached the CCA after the CCA conducted the surprise inspection. In certain, usually smaller countries or due to social, historical or cultural features, the undertakings are less interested in engaging in leniency programs and submitting leniency applications, especially taking into account that often the same undertakings will unavoidably continue working as business partners, the fear of retaliation and the punishment.

## 3. Impact of the settlement on the leniency program

23. Settlement is a new legal instrument that was introduced into the last Revised Competition Act 2021, enabling a party in a cartel case infringement proceeding carried out by the CCA to present a settlement submission in writing not later than 30 days after the receipt of the Statement of Objections.

24. The party to the proceeding voluntarily and fully admits the participation in a cartel or a secret cartel and describes in writing their acknowledgement of, or their renunciation to dispute against the decision of the CCA in the cartel case concerned.

25. If the CCA decides to accept the settlement submission it shall reduce the fine by 10 % to 20 % of the total amount of the fine that would otherwise be imposed on the party concerned without the settlement submission. The decision about the settlement submission will be taken by the CCA relating only to the parties to the proceeding that have presented the settlement submission concerned. With respect to other parties that have not presented the settlement submission or have withdrawn their settlement submission the CCA will continue to carry out the proceeding.

26. It is important to note that the settlement submission does not exclude the application of the Revised Competition Act 2021 with respect to the leniency programme. Should the CCA reject the settlement submission, it will inform the party thereof in writing whereas the statement of the party concerning the submission cannot be taken by the CCA as the only evidence for the identification of the infringement concerned.

## 4. New detection tools and/or investigative approaches in Croatia

27. Besides the above-described legal instrument of the settlement in a cartel and a secret cartel case, the related fine tuning of the leniency statement and the settlement submission, the Revised Competition Act 2021, having been harmonized with the ECN+ Directive, also provided several new investigative tools in the Croatian legal framework.

### 4.1. Interviews as new investigatory tool

28. Under the Revised Competition Act 2021 the CCA is empowered to summon for an interview any representative of an undertaking or other legal persons and any natural person who may possess information relevant for the application of the Act and Articles 101 and 102 TFEU, that is to say, in the course of the preliminary investigation in the relevant market and before the initiation of the proceeding and/or after the infringement proceeding has already been initiated.

29. At the same time, the request of the CCA must be proportionate and not compel the invited persons to admit to an infringement. The invited persons must comply with the request of the CCA. The CCA has started using this investigatory tool in several cases and it has already been proved to be effective.

#### **4.2. Notion of negligence and intent**

30. Another novelty derived from the transposition of ECN+ Directive is the introduction of notion of negligence and intent. For serious infringements, an undertaking who acts with intent or negligence will be punished with the fine prescribed for that infringement.

31. In the process of transposition of the ECN+ Directive into the Croatian legal regime it was important to clear the meaning of the terms "intention" and "negligence" in competition cases, where they must be interpreted in accordance with the practice of the Court of Justice of the European Union in the application of Articles 101 and 102 TFEU, and not in the sense of their meaning in the criminal law proceedings.

#### **4.3. Measures as another tool for deterrence**

32. The proposal of behavioural and/or structural remedies by the undertakings and their acceptance by the CCA have been in use for many years in merger assessment procedures and abuse of a dominant position. Recently, the CCA has also been empowered to impose behavioural and/or structural measures in its decisions in the proceedings related to restrictive agreements provided that these measures are proportionate to the infringement and necessary to bring the infringement to an end, that is to say, as a measure to eliminate the anticompetitive effects of the restrictive agreement at issue.

#### **4.4. Other new investigatory detection tools and challenges**

33. With the view to combating the most harmful cartels, the Croatian legislation, taking after the EU acquis and the national legislation frameworks of the Member States, has ensured the implementation of the leniency program that has proven as an extremely effective tool in detecting and investigating cartels in Europe. However, Croatia still faces some challenges in the implementation of this valuable tool in the fight against secret cartels.

34. Leniency and/or immunity is a key tool in detecting and deterring cartels. It is widely used around the world to tackle cartel conduct. So far, there has been no leniency submission in the practice of the CCA.

35. The fact that these infringements, in the opinion of the CCA, remain underreported since someone who has knowledge or information about a cartel may be reluctant to report it for fear of negative consequences or reprisals, requires proactive policy to encourage those involved to report cartels, concretely in the form of intensified advocacy and trainings. This knowledge may also be the key to detecting and breaking up cartels, which would encourage the undertakings participating in a cartel or a secret cartel to cooperate with the CCA with the view to being exempt from fines and sanctions.

36. Furthermore, related to the individual liability of natural persons, the question remains open whether the legislator would be prepared to enact new legal solutions in the future that would establish direct liability of natural persons for severe violations of competition rules, or even to go a step further and to introduce criminal liability for cartel conduct, as already widespread in international judicial practice.

37. It can be concluded that the issue described above is primarily the result of the undertakings' unwillingness to report their business partners and competitors, which is typical for a small market such as Croatian, and the general lack of knowledge of the possibilities to exercise their rights through the confidential tool such as the leniency program.

38. To this end, it is necessary for the CCA to continue to provide various forms of training and education, such as specialized seminars or round tables on the subject of the leniency program, as well as the general promotion of that instrument (CCA website, promotional materials, videos, brochures etc.).

39. It must be noted that this new tool has been established on the basis of the Cooperation Agreement concluded between the Ministry of the Economy and the CCA, which has provided the CCA with the unlimited and free access to the data uploaded in the electronic registry of public procurement and a special e-mail address for reporting cartels or secret cartels in public procurement. This tool is expected to make a major difference in the implementation of the leniency program.

40. New investigative tools and further promotion of leniency by using different advocacy tools should further contribute to successful detection of most harmful infringements and effective competition in the market producing benefits for the consumers.

## 5. Final remarks/conclusion

41. The leniency program and the settlement procedure in cartel proceedings are important tools in the enforcement of competition law because they contribute to the detection and effective prosecution of the most serious infringements of competition law, and the imposition of sanctions for such infringements.

42. With the aim of a more uniform approach at the EU level, a more detailed regulation of the leniency program in the Croatian competition law is necessary, especially with respect to the interface between the administrative procedure on one hand, and the criminal prosecution, on the other hand. These changes would encourage those involved to report cartels and increase the number of applications for immunity from and reduction in fines in Croatia.

43. New detection tools such as the access to the electronic registry of public procurement and further promotion of leniency would further contribute to effective detection of cartels and secret cartels and at the same time encourage the leniency applicants to cooperate with the CCA in resolving most serious infringements of competition law.