

Unclassified

DAF/COMP/GF/WD(2012)31



Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

13-Jan-2012

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE

## Global Forum on Competition

### IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

#### Contribution from Croatia

-- Session II --

*This contribution is submitted by Croatia under Session II of the Global Forum on Competition to be held on 16 and 17 February 2012.*

JT03314314

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## IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS

-- Croatia <sup>1</sup>--

### 1. Introduction

1. The provisions of the Competition Act (2009) of the Republic of Croatia prohibit cartel agreements between undertakings. In its Chapter II., Agreements between Undertakings, it provides the clauses on prohibited agreements understood by such based on the Competition Law<sup>2</sup>. Therefore, there shall be prohibited all agreements between two or more independent undertakings, decisions by associations of undertakings and concerted practices, which have as their object or effect the distortion of competition in the relevant market, and in particular those which<sup>3</sup>:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage;
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts<sup>4</sup>.

2. These agreements particularly refer to contracts, particular provisions thereof, implicit oral or explicitly written down arrangements between undertakings, concerted practices resulting from such arrangements, decisions by undertakings or associations of undertakings, general terms of business and other acts of undertakings which are or may constitute a part of these agreements and similar, notwithstanding the fact if they are concluded between undertakings operating at the same level of the production or distribution chain (horizontal agreements) or between undertakings who do not operate at the same level of the production or distribution chain (vertical agreements).

3. By way of derogation from quoted prohibition, certain categories of agreements shall be granted exemption from and consequently such agreements among undertakings shall not be prohibited if they, throughout their duration, cumulatively comply with the following conditions: (1) if they contribute to

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<sup>2</sup> Croatian Competition Act (2009); furthermore: Competition Law, CA, or Act; The Law is aligned to the EU *acquis communautaire*.

<sup>3</sup> Art. 8 CA.

<sup>4</sup> The provision of the quoted Article of the Competition Act is aligned with the Treaty on the Functioning of the European Union - TFEU Art. 101.

improving the production or distribution of goods and/or services, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; (2) if they do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; and (3) if they do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of goods and/or services in question.

4. However, Agreements among entrepreneurs that prevent, restrict or distort competition within the above established definitions, based on the Law, provided that they would not fulfil the conditions listed in previous paragraph, as well as the agreements which do not qualify for the block exemption, according to the Law are declared to be null and void.

5. Namely in certain cases the block exemptions could be granted to such agreements between entrepreneurs that could demonstrate and prove to the Agency the existence of the criteria for the block exemption, such as<sup>5</sup> (i) for the agreements between undertakings not operating on the same level of production or distribution (vertical agreements), and in particular, exclusive distribution agreements, selective distribution agreements, exclusive purchase and franchising agreements; (ii) for the agreements between undertakings operating on the same level of the production or distribution (horizontal agreements), and in particular, research and development and specialization agreements; (iii) for the agreements on transfer of technology; (iv) for the agreements on distribution and servicing of motor vehicles; (v) for the agreements in insurance sector; and (vi) for the agreements between undertakings in the transport sector.

6. However, the Competition Agency would *ex officio*, initiate the proceedings to assess the compatibility of a particular agreement which has been granted block exemption, where it finds that the particular agreement, in itself or due to the cumulative effect with other similar agreements in the relevant market, does not comply with the conditions set out in the Competition Law (Article 8). Should the Agency in the course of the proceedings find that the agreement concerned produces certain effects which contravene such conditions, then the Agency would decline the block exemption or withdraw already granted exemption.

7. Finally the Croatian Competition Act also recognizes de minimis rule and establishes the further exclusions for the parties in such agreements<sup>6</sup>. The mentioned de minimis agreements are defined as agreements in which the parties to the agreement and the controlled undertakings have an insignificant common market share, provided that such agreements do not contain hard core restrictions of competition that, in spite of the insignificant market share of the parties to the agreement, lead to distortion of competition.

## **2. Existing tools for international co-operation<sup>7</sup>**

8. International cooperation is important in detecting and prosecuting the cartels which are damaging to the economies of many countries affected with their harm to the international trade. Croatian Competition Agency has entered into several international cooperation agreements in order to enhance the procedural issues in finding and prosecuting the cartels which operate cross-border.

*2.1 Please identify any formal mechanisms and / or co-operation agreements you have entered into with a foreign country or antitrust authority, the type of agreement (MLAT, MOU, RTA, etc) and the powers available under this agreement. For example, does the agreement allow your authority to conduct searches and inspections on behalf of competition authority from another jurisdiction?*

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<sup>5</sup> CA; Art. 10.

<sup>6</sup> CA, Art. 11.

<sup>7</sup> This paragraph contains the exact questions of the OECD Secretariat, rather than corresponding subtitles.

9. Croatian Competition Agency has entered into several agreements on cooperation with other authorities. Within the country these authorities are from the side of various sector regulators, such as for telecommunications, energy, postal services, etc., and with the other jurisdictions competition authorities. Such agreements are closed only with competition authorities from the foreign countries. These countries are in the Europe, some of them are the EU members, and some not. Those non EU countries, are mostly countries that are bordering to the Republic of Croatia, or within the Region. The type of the said international cooperation agreements are mostly the memoranda on understanding.

10. Most important is that the Agency is a member to several multilateral competition fora, such as International Competition Network (ICN), and UNCTAD, but also started the engagement in the European Competition Network (ECN), since the year 2011, and participates to the annual OECD fora on competition.

2.2 *Please describe the informal mechanisms your competition authority has in place for co-operating with other jurisdictions, and how these have helped in cartel investigations. For example, has your authority conducted any joint inspections/dawn raids in conjunction with another competition authority?*

11. Agency cooperates also with European (EU and non-EU) countries with which it has not already closed the cooperation agreements. Such cooperation is enforced in various fields of competition law and policy implementation. Informally the written request can be send to the competition authority in certain jurisdiction(s), with the questions and inquiries that are of importance for particular case held in the Agency or for the particulate sector inquiry.

2.3 *To what extent have you used OECD instruments, e.g. the 1995 Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade and the 2005 Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations, in your investigations? For what purpose were they used and how helpful were they?*

12. The said documents are used on informative basis, for the purposes of better understanding the role and the methods of international cooperation. However the said documents are built in the best practices and further documents on international cooperation discussed at the ICN dedicated working groups, to which this Agency also takes part ordinarily.

### **3. Types of cooperation**

3.1 *What type of co-operation does your agency request from other agencies in cartel investigations? What type of co-operation is received? At what stage of the proceedings does this co-operation take place and on what issues? For example, is co-operation related to exchange of relevant information, the organisation and execution of dawn raids, the setting of fines or to the discussion of substantive issues, such as market definition, theory of harm, etc.?*

13. The most demanding, but also the most efficient way of international cooperation among the competition authorities are in cases in conducting the dawn raids in detecting the hard core cartels. The Competition Act in its Article 42, provides the rules for inspections of the business premises, other premises, land and means of transportation, as well as for the affixation of sealing and temporary seizure the objects in question.

14. However, prior to the conduct of an inspection (dawn raids) of the business premises, land and means of transport, the Agency shall in line with the relevant rules for collecting evidence applicable in non-contentious procedures make a request to the Administrative Court of the Republic of Croatia to issue a warrant authorizing the Agency to conduct a dawn raid of business premises, land and means of

transport, to examine all records and objects relating to the business, to seal any business premises or records and to seize objects and documents found on these premises, particularly if there it can be reasonably assumed that the evidence might be destroyed or concealed.

15. If a reasonable suspicion exists that evidence related to the subject-matter of the inspection may be replaced or altered by the parties to the proceedings, the authorised persons of the Agency may alone or with the assistance of law enforcement authorities of the Corporate Crime Department conduct inspections, on which the parties or the proprietor of the premises and objects will be informed at the spot, at the moment of the conduct of the inspection.

16. The authorised persons of the Agency shall exercise their powers of surprise inspection upon production to the party to the proceeding or the proprietor of the premises and objects, of the identification card and the warrant to carry out the inspection issued by the Administrative Court of the Republic of Croatia. The authorised persons to conduct an inspection are empowered: (i) to enter and inspect any premises, land and means of transport (hereinafter: the premises) at the seat of the undertaking against which the procedure is being carried out as well as in any other location where the undertaking concerned performs its business activities; (ii) to examine the books and other records related to the business, irrespective of the medium on which they are stored; (iii) to take or obtain in any form copies of or extracts from such books or records, irrespective of the medium on which they are stored; (iv) to seize the necessary documentation and to retain it as long as it takes to make photocopies where due to technical reasons it is not possible to make photocopies during the inspection. The authorised person shall make an administrative note thereof; (v) to seal any premises and/or books or records for the period and to the extent necessary for the inspection; (vi) to ask any representative or member of staff of the undertaking for explanations on the facts or documents relating to the subject-matter and purpose of the inspection and to record the answers; (vii) to ask any representative or member of staff of the undertaking to submit a written statement on the facts or documents relating to the subject-matter and purpose of the inspection and set the deadline in which this statement must be submitted; and (viii) to perform any other actions in accordance with the purpose of the inspection.

17. Where during the conduct of an inspection (dawn raid), the objects, books or other documentation are temporarily seized, the Agency shall make an administrative note thereof particularly specifying the place where the objects concerned have been found accompanied with the description thereof. The authorised person of the Agency shall without delay issue a certificate on the seizure of objects and documentation concerned. The objects, books and documentation which have been seized shall be retained as long as the facts and circumstances contained in the evidence concerned are established. However, this period may not be extended after the day on which the Agency closes the proceedings in the case concerned.

3.2 *How does the cooperation take place? For example, is it by telephone, email or through face to face meetings? How successful has the co-operation been? What aspects of co-operation have worked particularly well and what has been less successful?*

18. The cooperation in international matters take place by email or telephone conversations / conferences.

#### **4. International vs. regional co-operation**

4.1 *Which competition authorities you co-operate with the most? How often do you co-operate? Do you co-operate more with the authorities located geographically close-by?*

19. Due to the specific circumstances that the most alleged injuries of the competition statutes affect cross border territories, but also considering the fact that such territories are more or less closely connected, the cooperation would rather be regional in particular cases.

4.2 *Are you part of a regional competition network? If so, to what extent has this network assisted in the cartel investigations you have carried out?*

20. Croatian Competition Agency is a part of the International Competition Network – ICN, and from the end of the year 2011 is invited to participate to particular sessions of the European Competition Network (ECN). More regional competition networks do not exist in this part of the Europe.

4.3 *If you are a new/young agency to what extent do you co-operate with your neighboring competition authorities, other new competition authorities in the region, and/or mature agencies either in the region or overseas? If you are a mature agency, which are the competition authorities with which you co-operate most, and how do you respond to and prioritise requests received from newer agencies?*

21. The means of cooperation, beside already mentioned also encompass the invitation for participation to the various workshops, attending the competition days, and ad hoc consultations.

## **5. Identifying gaps and improving the current frameworks**

5.1 *What are the current challenges faced by your competition authority in cartel investigations which have a cross- border dimension (e.g. anti-competitive cross-border effects or evidence located in foreign jurisdictions)? To what extent would international co-operation with other competition authorities overcome these challenges?*

22. The most complicated challenges which would be difficult to resolve is the dimension of the conducting the investigations, which means dawn raids in several jurisdictions because they involve the prerequisite of obtaining the court orders.

5.2 *How do you deal with co-operation in cartel cases that encompass both criminal and civil enforcement regimes? For example, how do you ensure that the privilege against self incrimination is respected when using the information exchanged with other agencies in criminal proceedings against individuals? If you have a civil system in place for cartel enforcement, have you faced any particular problems coordinating with those jurisdictions with a criminal enforcement system and vice versa? What issues have arisen and how do the different systems affect the quality and / or intensity of coordination?*

23. Croatian Competition Agency so far did not have a case of cooperation in cartel investigation that would involve the regimes that sanction cartels as a criminal deed.

5.3 *How do you think your current system could be improved in relation to the way in which international cartels are investigated? In what way could liaising with competition authorities in other jurisdictions be improved?*

24. The factors that could influence the improvement of mutual investigations involve direct communication with the persons in charge of conducting the investigations on both sides, which is proved to be the most efficient way for the direct and quick exchange of important information and coordination of the work.

5.4 *Have there been any instances in which a cartel investigation or case could have benefited from information or co-operation from a foreign competition agency, but your agency did not request such assistance because you knew that it could not or would not be granted?*

25. Croatian Competition Agency has always provided the assistance whenever requested, and also has obtained the assistance from various enforcement competition agencies. Most important means were when sharing information in particular cases, even sending the corresponding decisions where the violation of the competition statutes were established.

## 6. Information Sharing

6.1 *What are the main barriers to information sharing that you have encountered when requesting information from another jurisdiction? Please provide examples. How have these affected cartel investigations in your jurisdiction? Have you managed to obtain the information using any other means?*

26. Sometimes the requested information contain the protected data, and in such cases the providing authority could not disclaim them for the prevention of future possible civil actions for unauthorized disclosure of the protected information.

6.2 *Are there any legal constraints which would prevent your agency from providing information related to a domestic or international cartel to the competition authority of another jurisdiction? What are these constraints? Do you have any legislation preventing information exchange?*

27. Croatian Competition Act provides the clauses for protecting the confidential data which come out in a course of a procedure. Consequently, the clause of the Art. 53 of the Competition Act provides for the secrecy obligation. Therefore, the Members of the Competition Council and the employees of the Agency shall keep and not disclose the information classified as a business secret, irrespective of the way they came to know it, whereby the obligation of business secrecy shall continue to be in effect 5 years after the expiry of their engagement with the Agency.

28. Under the term business secret, shall be considered, in particular the following:

- all data and documentation which is defined to be a business secret by law or other regulations;
- all data and documentation which is defined to be a business secret by the undertaking concerned if accepted as such by the Agency;
- all correspondence between the Agency and the European Commission and between the Agency and other international competition authorities and their networks .

29. However, a business secret referred to above, shall be in particular business information which has actual or potential economic and market value, the disclosure or use of which could result in economic advantage for other undertakings.

30. Finally, the Agency will in particular apply the following non-exhaustive list of criteria to determine whether information can be deemed to constitute a business secret:

- the extent to which the information is known outside the undertaking;
- the extent to which measures have been taken to protect the information within the undertaking, for example, through non-compete clauses or non-disclosure agreements imposed on employees etc.;
- the value of the information for the undertaking and its competitors.

31. In principle, the Agency considers that the following kind of information would not be covered by the obligation of business secrecy in the sense of the prescriptions of the Competition Act:

- information which is publicly available, including information available through specialised information services or information which is common knowledge among specialists in the field;
- historical information, in particular information at least five years old, irrespective of the fact whether they have been considered a business secret;
- annual and statistical information. Turnover is not normally considered as a business secret, as it is a figure published in the annual accounts or otherwise known to the market, and
- data and documentation on which the decision of the Agency is based.

32. However, the derogation of the strict rules can be achieved in the cases whereas the undertaking would submit to the Agency confidential documentation and data and fail to provide a copy of the relevant documentation and/or data containing non confidential information; then Agency shall after it has sent a reminder thereof to the undertaking concerned, finally assume that such a writing and/or documentation did not contain data which were covered by the obligation of keeping of the business secrecy.

6.3 *To what extent can your authority rely on information gathered in another competition authority's investigation in your own investigation?*

33. In the hypothetical cases where the Croatian Competition Agency would handle proceedings for the protection of competition according to the Croatian Competition Act (2009), and if it would come to the point that in the course of the proceeding some additional data, the resource of which would come from the side of already opened cases / investigations from the another authority, whether some authority within the jurisdiction of the Republic of Croatia, or authority from the foreign jurisdiction, such data could be treated only as an exhibits. The judgment of the fact whether such data / evidence is reliable and fit to be used in the case shall be assessed from case to case basis, and according to the procedural rules of the Republic of Croatia, i.e. Administration Procedural Rules Act. However, as already mentioned afore, the final ruling of the Agency issued in first degree, can be challenged in front of the Administrative Court, because the judicial protection from the administrative authorities' decisions is prescribed by the Constitution Act of the Republic of Croatia.

6.4 *Does your jurisdiction / agency have any legislation, rules or guidelines regulating the protection of confidential information which is exchanged with an agency in another jurisdiction? What safeguards do you have in place for the protection of confidential information when co-operating with foreign government agencies?*

34. Croatian Competition Agency had issued internal rules for handling with the protection of confidential information acquired in a course of handling the cases in front of the Agency. However at the national level there are set of legislation that treat the keeping the protection of confidential information which have been acquired in a course of the administrative and / or court's proceeding, but such legislation do not differentiate the treatment of the exhibits / data coming out from foreign authorities from the data collected from other domestic authorities.

6.5 *What is your policy for exchanging information with other jurisdictions that has been provided as part of an amnesty/leniency programme? Do you request (and receive) waivers from companies being investigated in order to facilitate information exchange with other agencies investigating the same cartel? In practice do you request waivers as part of the leniency application? How important are waivers, and the information received from other investigating authorities as a result, to the effectiveness of the cartel investigation?*

35. The Regulation on the Criteria for Implementing the Leniency Program was enacted in 2010<sup>8</sup>. Beside this, the Croatian Competition Agency has brought the internal rules considering the leniency program which would be applied in a course of the proceedings in front of the Agency. Agency already has received one application for waiving of the so called marker in a competition matter. The subjected request was taken into the consideration from the side of the Agency, and the marker was not granted, nor declined yet.

6.6 *Do you have any particular safeguards in place for information that has been given under an amnesty/leniency programme?*

36. The Croatian Competition Agency has already undertaken all necessary and feasible measures to ensure the safe and efficient handling with the information that are obtained under a leniency programs.

## **7. International Co-operation within other policy areas**

7.1 *Are you aware of any other law enforcement areas in your jurisdiction (for example tax, bribery or money laundering) which face similar challenges in international co-operation as those faced by competition authorities in cross-border cartel cases?*

37. Other authorities, i.e. ministries frequently and efficiently cooperate with foreign authorities of corresponding jurisdiction. Above all, the efficient cooperation is provided based on the system of laws which regulate international matters in administrative and court's proceedings, and provide for the enforcement of court's and administrative authorities' decisions in the territory of the Republic of Croatia.

7.2 *Does your authority liaise with any other regulatory authorities to discuss common problems/solutions? Please provide examples.*

38. Croatian Competition Agency does liaise with other regulatory authorities in order to discuss common problems and / or solutions. Such consultations are undertaken in both formal and informal ways. The formal ways of such kind of cooperation originate from the closed agreements on cooperation / memoranda on understanding, and based on the officially lodged requests put in front of the Competition Agency from the side of some other regulatory authority, where that regulatory authority would propose to the Agency to initiate the proceeding, investigation or to provide it with the expert opinion in certain cases. Informal ways of cooperation involve direct contacts and consultations among the persons in charge for handling the cases on both sides, of the Croatian Competition Agency and on the side of the regulatory authority in question.

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<sup>8</sup> Regulation of 11.11.2010; Official Gazette of the Republic of Croatia (Narodne Novine), Nr. 129/2010.