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COMPETITION COMMITTEE****Roundtable on Safe Harbours and Legal Presumptions in Competition Law - Note
from Croatia****5 December 2017**

This document reproduces a written contribution by Croatia submitted for Item 5 of the 128th OECD Competition committee meeting on 5-6 December 2017.

More documents related to this discussion can be found at www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm

Please contact Mr. Antonio Capobianco if you have any questions about this document
[E-mail: Antonio.Capobianco@oecd.org]

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Croatia

1. At the outset, talking about conducts for which there are safe harbours and/or presumption of illegality or legality, let us define the powers of the Croatian Competition Agency (CCA). They cover the following:

- establishment of **prohibited agreements between undertakings** and definition of the commitments necessary for the elimination of harmful effects of anti-competitive behaviours,
- establishment of **abuse of a dominant position of undertakings** and prohibition of any behaviour leading to abuse as well as the definition of the commitments necessary for the elimination of harmful effects of such anti-competitive behaviours, and
- assessment of compatibility of concentrations between undertakings.

2. Additionally, within its competence relating to competition advocacy and promotion of competition culture, the CCA also issues expert opinions on the compliance with the Competition Act of draft law proposals, other proposed legal acts, existing legislation and other competition-related issues.

3. Safe harbours and/or presumption of illegality or legality are not as such defined by any legal act, but they can be derived from the provisions of the Competition Act (OG No. 79/2009 and 80/2013), the block exemption regulations and the case law. Specifically, Article 8 paragraph 1 of the Competition Act under the headline “Prohibited agreements“, provides for the following presumption which may be rebutted on the basis of paragraph 3 thereof:

“Prohibited agreements

Article 8

(1) 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:

- 1. directly or indirectly fix purchase or selling prices or any other trading conditions;*
- 2. limit or control production, markets, technical development or investment;*
- 3. share markets or sources of supply;*
- 4. apply dissimilar conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage;*
- 5. 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.*

...

(3) By way of derogation from paragraph (1) hereof, certain categories of agreements shall be granted exemption from general prohibition under

paragraph (1) of this Article and consequently shall not be prohibited if they, throughout their duration, cumulatively comply with the following conditions:

- 1. they contribute to improving the production or distribution of goods and/or services, or to promoting technical or economic progress,*
- 2. while allowing consumers a fair share of the resulting benefit,*
- 3. they do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives, and*
- 4. 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. Considering other particular practices, no presumptions have been explicitly defined by the domestic legislation but are drawn from the EU acquis. Such a presumption is, for example, that it is allowed to exchange information which is historical and aggregate. For the sake of illustration, please note the below quoted part of the letter sent by the CCA in 2012 responding to the request of Croatian Chamber of Economy that sought the CCA opinion regarding the conduct of the beer manufacturers:

“1. The data on the quantities of beer sold in a period of time older than one year, in accordance with the aforementioned comparative practice, may be considered as historical data. The exchange of such information is generally not considered to raise competition concerns.

2. The data on the quantities of beer sold in the time period of one year or in the last 12 months are considered recent data. Given that these data are recent and sensitive, it would be necessary to further make a distinction between the aggregate data and the data relating to the specific brewery. In that sense, the exchange of the recent data indicating the sold quantities of beer between individual brewers may give rise to competition concerns and could constitute a violation of competition rules.

...

In connection with the above, the CCA found that regardless of the data collection model it would be necessary to ensure that the beer brewers are not given access or have access to the recent data indicating the quantities of beer sold by a particular competitor. This is to avoid the possibility for any brewery to have individual information on their competitors' businesses.”

5. As regards vertical agreements, the Regulation on Block Exemption Granted to Certain Categories of Vertical Agreements (OG No. 37/2011) may be *per se* regarded as safe harbour for undertakings. This Regulation stipulates the conditions that vertical agreements between undertakings must contain and the restrictions or conditions that such agreements may not contain in order to benefit from a block exemption from the general ban set out in the above mentioned Article 8 paragraph 1 of the Competition Act.

6. To that end we mention the case of an established retail-price-maintenance practice, where the effects of such behaviour did not have to be demonstrated. The decision of the CCA has also been confirmed by the court. Namely, the High Administrative Court of the Republic of Croatia dismissed the claims made by the undertakings Narodni trgovački lanac (NTL) and Kraš against the decision of the CCA of 3 December 2014 establishing that the undertakings entered into a prohibited agreement on the basis of which they committed an infringement of competition rules in the time

period from October 2010 to July 2014. Namely, under the sales agreement Kraš and NTL agreed upon a minimum resale price in accordance to which the distribution chain NTL was not allowed to sell Kraš' products below the agreed price (RPM). Otherwise Kraš would be entitled to retaliation measures (disrupt the supply and NTL would lose its extra bonuses). In this particular case the CCA did not find evidence that the challenged provisions had been applied in practice. However, given the fact that they had been repeatedly incorporated in three subsequent agreements and that they had been in force for almost four years, Kraš was in the position to impose them at any time and stop its supply to NTL and void the extra bonuses. The fines imposed by the CCA in the case concerned amounted to 2.5 million Kuna.

7. "The Court finds that in the proceeding concerned the facts of the case were correctly and completely established, that the substantive law was correctly applied and that no breach of procedural rules was committed. In the assessment of the Court the defendant had taken all relevant facts and circumstances of the case into account when imposing the fine defined in the fine setting procedure, including the long duration of the infringement, and provided a detailed explanation of its decision, which this Court accepts", stated the High Administrative Court in the recital of its ruling.

8. In regard to abuse of a dominant position, it should be noted that the 2009 Competition Act in effect, although mentioning the threshold of 40 %, renders the notion of a "dominant position" more relative than it was the case with the previous acts.

"Dominant position

Article 12

(2) Within the meaning of this Act an undertaking which holds more than 40% of the market share in the relevant market may hold a dominant position."

9. Finally, in the area of assessment of concentrations between undertakings, just like in the majority of jurisdictions, notification thresholds as defined in the Competition Act provide legal certainty for the undertakings - parties to a concentration (Article 17 of the Competition Act):

"Obligatory notification of concentration and turnover thresholds

Article 17

(1) In order to assess the compatibility of concentration, the parties to the concentration are obliged to notify any proposed concentration to the Agency if the following criteria are cumulatively met:

1. the total turnover (consolidated aggregate annual turnover) of all the undertakings - parties to the concentration, realized by the sale of goods and/or services in the global market, amounts to at least HRK 1 billion in the financial year preceding the concentration and in compliance with financial statements, where at least one of the parties to the concentration has its seat and/or subsidiary in the Republic of Croatia, and

2. the total turnover of each of at least two parties to the concentration realized in the national market of the Republic of Croatia, amounts to at least HRK 100,000,000 in the financial year preceding the concentration and in compliance with financial statements.

(2) Where the parties to the concentration are unable to deliver financial statements at the time of the notification of concentration, the last year for which the parties to the concentration have concluded their financial statements shall be taken as the relevant year in the assessment procedure.

(3) The intra-group turnover realized by the sale of goods and/or services by undertakings within a group shall not be taken into account when calculating the total turnover referred to under paragraph (1) of this Article.

(4) Where the concentration referred to under Article 15 paragraph (1) hereof consists of the acquisition of a part or parts of one or more undertakings, whether or not constituted as legal entities, the calculation of the turnover within the meaning of paragraph (1) of this Article shall include only the turnover relating to the parts which are the subject of the concentration.

(5) However, two or more transactions within the meaning of paragraph (4) of this Article which take place within a two – year - period shall be considered to constitute one concentration, arising on the day of the last transaction.

(6) The Agency shall assess the compatibility of only those planned concentrations which are subject to obligatory notification as stipulated in paragraph (1) of this Article.”

10. The notification threshold means turnover realised by all the parties to the concentration in the in the financial year preceding the concentration. However, over the years of the CCA’s practice the very definition of “turnover” has emerged as potentially disputable. In other words, on several occasions the CCA received questions from undertakings as to whether excise duties are included in the calculation of turnover. Indeed, the above mentioned Article 17 provides for no reference in this regard. Having consulted the relevant tax rules which explicitly state that excise duties are part of the revenue of the State, the CCA took the view that excise duties cannot constitute a part of the undertaking’s turnover for the purpose of calculation of notification thresholds, notably in industries such as tobacco or oil industry.

11. Taking into account all the above mentioned considerations, we can say that by incorporating the relevant provisions into the Competition Act and the ancillary regulations, the Croatian Competition Agency has achieved full harmonisation with the relevant European rules and standards. However, in some cases, the course of action may not be that so clear-cut from the beginning. Where in doubt, the case law may be consulted as the basis for determining legal presumptions with the ultimate purpose of providing the highest possible degree of legal certainty for undertakings.