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I. INTRODUCTION

The Croatian Competition Act 2003 prohibits cartel agreements and considers them to be null and void: “agreements between undertakings..., explicit or tacit agreements, coordinated practice... which have as their object or effect distortion of competition are prohibited, in particular those by which undertakings determine directly or indirectly purchase or sale prices, or other commercial terms.”² Although this provision is modeled on Article 81 EC, there is a significant departure from the Community acquis in part of the provision which mentions “tacit agreements.” It is a widely accepted view that tacit collusion should not be prohibited unless the behavior at stake cannot be explained in any other way. This view is strongly promoted by antitrust economists³ and was also accepted by the European Court of Justice.⁴

Although the first Croatian Competition Act (1995) was already drafted under the influence of EC competition law, it was the Stabilisation and Association Agreement (“SAA”) signed between Croatia and EU in 2001 that introduced an obligation for Croatia to harmonize its domestic legislation with the acquis (Art 69 SAA),⁵ which resulted in adoption of the new, more thoroughly harmonized Competition Act in 2003. Pursuant to the SAA (Art 70) Croatian authorities must apply, to restrictive agreements and abuse of dominant position (and state aid), criteria arising from the application of Community competition rules provided there is an effect on trade between Croatia and Community. Unlike Europe Agreements, which also contained a similar provision, no implementing rules must be adopted to this effect.

Under the current Croatian competition regime there is no leniency program. However, the possibility of a more lenient treatment of undertakings is extensively used by the Croatian misdemeanor courts when deciding on a fine on the basis of the

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² Competition Act (Zakon o zaštiti tržišnog natjecanja), Official Gazette, No. 122/2003, Art 9.

³ M. MOTTA, COMPETITION POLICY: THEORY AND PRACTICE, 137-138 (2004). F. Alese, *The economic theory of non-collusive oligopoly and the concept of concerted practice under Article 81, 20(7) EUR. COMPETITION L. R.*, 379-383, 381 (1999).

⁴ See Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 A. Ahlström Osakeyhtiö and others v Commission (Woodpulp II), (1993) ECR I-1307.

⁵ Act on ratification of the Stabilisation and Association Agreement between the Republic of Croatia, of the one part, and the European Communities and their Member States, of the other part (Zakon o potvrđivanju Sporazuma o stabilizaciji i pridruživanju između Republike Hrvatske i Europskih zajednica i njihovih država članica), Official Gazette – International Agreements, No. 14/2001.

Competition Agency infringement decision (under the current legislation the Agency has no competence to pronounce fines). Misdemeanor courts are for this purpose applying the general rule of criminal law on immunity from fines and reduction of fines, and thereby perversely distorting the efficient prosecution of undertakings that breach competition rules. Evidently, this is no alternative to having a U.S. or EU-style leniency program.

II. EARLY ENFORCEMENT PRACTICE

A. Orthopaedic Equipment Dealers Cartel (1999)

One of the first decisions of the then-newly established Competition Agency dealt with an explicit price agreement among undertakings selling orthopedic equipment.⁶ Some twenty undertakings, all members of an association of undertakings (Croatian Chamber of Economy—Orthopaedic Equipment Group), adopted a decision to give a joint bid to the Croatian Health Insurance Institute which was inviting a tender for procurement of orthopedic equipment. They also adopted a decision on a joint price list for orthopedic equipment. After they submitted their decision for a joint bid and the joint price list to the Health Insurance Institute, the Institute immediately informed the Competition Agency of their collusive actions.

The Competition Agency adopted a decision declaring the price agreement null and void. It held that price agreements may not be excluded from the prohibition because “prices are one of the main elements of competition” and that price agreements are liable to distort competition significantly. However, it also held that arrangements among members of an association of undertakings which contribute to promote the specific business activity “from organisational, technological, scientific, educational and other aspects is not only permitted, but also something to be wished for.”

B. Split Driving Schools Cartel (2001)

Another classic price cartel was prosecuted by the Competition Agency when seventeen driving schools from Split concluded an agreement on joint prices for B-class driving lessons.⁷ This was done under the auspices of their association, Croatian Community of Driving Schools—Regional Committee Split. They had agreed that parties to this agreement may not publicly advertise a lower price, and they stipulated a pecuniary fine for breach of this obligation. It was the associations’ role to make the calculation of an “objective and real” price, under which it was not possible to operate. In the course of proceedings the association of undertakings stated that the implementation of the agreement has not been successful since “some driving schools are trying to secure work by competing with lower price.”

⁶ Otto Bock Adria d.o.o. et al., decision of the Croatian Competition Agency, 15.12.1997, published in Glasnik AZTN, No. 1, Dec 1999, p. 29 and 81-83 (not published in the Official Gazette).

⁷ Biserka-ST d.o.o. et al.—decision of the Croatian Competition Agency, 19.2.2001, Official Gazette, No. 18/2001.

The Competition Agency adopted a decision declaring this agreement to be prohibited and thus null and void. It held that the justification provided by the association on the necessity to calculate “an objective and real price” was not acceptable and stated that the agreement was “significantly restricting free competition.”

C. Uniform Calculation Elements Case (2002)

In another driving schools case the Competition Agency had to scrutinize a cooperation agreement concluded among driving schools which agreed not on the uniform price but on “uniform calculation elements for price of one teaching hour.”⁸ Once again this was done under the auspices of an association—Croatian Community of Driving Schools. The peculiarity of this case is that the participating undertakings voluntarily submitted their agreement for approval to the Competition Agency. Even odder was that the Agency held that this did not amount to a price agreement and that the agreement on “calculation elements” was not illegal since it was visible from the price lists submitted by the parties that they charged different prices for an hour of driving lessons.

III. RECENT ENFORCEMENT PRACTICE

A. Demining Operators Cartel (2005)

As a response to falling prices on the market for demining services, seventeen demining companies in Croatia signed an explicit agreement whereby they determined a price per square meter which may be asked by each undertaking.⁹ They also divided the market geographically by determining in which locations each undertaking may provide its services. This was done for the purpose of a public tender that was about to be announced by the Croatian Demining Centre (“HCR”), an undertaking granted to perform some public authority tasks but also a competitor on the market.

The agreement contained elaborated provisions intended for maintaining cartel discipline and included means for punishing “cheaters.” As in all other cases mentioned above, the agreement was signed under the auspices of an association to which each and every one of these undertakings belonged (Croatian Association of Employers—Demining Association). In this case an active role was envisaged for the association in the implementation of the cartel agreement: an executive committee of the association had to appoint a commission which had the task of carrying out proceedings in case there was a deviation from the agreed provisions, with the final goal to compensate for any damages an undertaking suffered after being exposed to “illegitimate” competition by a cheating undertaking. For this purpose each party to the agreement deposited a promissory note for the amount of 1 million HRK (approx. EURO 135,000 or \$200,000) in

⁸ Semafor d.o.o. et al. — decision of the Croatian Competition Agency, 2.9.2002 (not published in the Official Gazette).

⁹ HCR v AKD-Mungos et al. — decision of the Croatian Competition Agency, 4.10.2005, Official Gazette, No. 119/2005.

a bank safe opened specially for this purpose. If a competitor, also party to this agreement, was to apply to a tender for a location previously granted by agreement to another undertaking, and successfully offered to provide demining services for a lower price, the “damaged” undertaking had to be compensated from the deposited promissory note.

The Competition Agency adopted a decision declaring this to be an illegal cartel agreement, which was “always prohibited” since it had no positive effects on the market. The Agency rejected the argument of the accused undertakings that the agreement has not been implemented by the undertakings. On the contrary, the Agency established in the proceedings that thirteen contracts for provision of demining services were concluded exactly “for the price” and “with the undertaking” as previously agreed by competitors. Even if the agreement was not consummated, the Agency held, it would still be deemed prohibited by the Competition Act on the basis of its aim to distort competition.

B. Bus Operators Cartel (2007)

The most recent cartel case dealt by the Competition Agency involved a coordinated price increase by providers of bus services on two routes in Croatia: Zagreb-Split and Zagreb-Šibenik (the capital town of Zagreb and two big towns on the Adriatic coast).¹⁰ As of July 1, 2006 all seventeen competitors started charging the same price for its service although price levels had been different before this date. It was within a period of only six days that they all informed the relevant bus stations of the price increase and, without exception, from this date on they all started charging the new prices. This was indicia enough for the Agency to start the proceedings.

Once the proceedings started the Competition Agency succeeded in securing written proof of competitors’ previous explicit coordination on price increases, which made clear that this was no tacit collusion case. A fax message was obtained, sent by one of the bus operators to one of the bus stations informing them of new prices as of July 1, 2006, with the following content: “pursuant to the written harmonisation of price lists of June 27, 2006, as verified by bus operators-signatories of the Promemoria, the price for route Zagreb-Split shall amount to 150 HRK” (approx. EURO 20 or \$30). It also said that “in case signatories of the Promemoria should not comply with the common price list... it shall be automatically cancelled.” In addition, it was established that competitors were in contact as regards prices and that they had agreed it was necessary to “determine the price in the amount of 150 HRK, which was on the lower level of profitability.”

As in previous cases discussed above, there was a role for the association of undertakings to be played in this case as well. The Agency was able to establish that

¹⁰ Autobusni promet d.d. et al. – decision of the Croatian Competition Agency, 24.9.2007, Official Gazette, No. 115/2007.

competitors had frequently exchanged information and opinions within the Croatian Chamber of Commerce-Road Carriers Group to which all of them belonged. It was actually the Chambers' staff that prepared the calculation of the most suitable price.

The decision adopted by the Competition Agency rightfully determined that a severe breach of competition rules has been committed.¹¹ It was held that, "in spite of the absence of a written agreement" the conduct in question amounted to coordinated practice since "the existence of identical prices and declarations by parties... point undoubtedly to the existence of a joint intention of the parties involved." Curiously, no breach of competition rules has been established as regards the association of undertakings which in this case played an active role in coordinating the competitors' behavior.

IV. UNDERLYING CHARACTERISTICS OF THE CROATIAN CARTEL ENFORCEMENT PRACTICE

Looking at the past enforcement practice described above, three underlying characteristics can be identified: (a) all cartel cases dealt with explicit collusion and, in all but the last case, a written cartel agreement was provided as evidence; (b) in all cartel cases there was an association of undertakings that promoted collusion and/or helped to enforce the cartel—however, this led to no incrimination of associations in any of the cases; and (c) undertakings often gave self-incriminating statements in cartel cases—this points to a weak awareness by undertakings of competition rules.

A. All Cases Dealt with Explicit Collusion

In all but the last case (Bus Operators cartel) a formal, written cartel agreement on prices was concluded among competitors and this agreement was unearthed by the Competition Agency.¹² Generally, decisions to collectively exercise their market power by concluding a cartel agreement were motivated by the need to "stabilise the market," to stop falling profits, and to counter the rising expenses. It is obvious that undertakings were aware of the possibility of deviation from the agreed terms and that they were ready to deal with this issue in a manner consistent with the modern economic cartel theory: they devised a mechanism for providing cartel discipline which included means to punish cheaters. A good example of enforcing discipline in a cartel is the Demining Operators case where special procedures were provided in case a cartel member decided to bid a lower price and thereby break the terms of cartel agreement.

Although in the Bus Operators case the Competition Agency was not able to discover a written cartel agreement among undertakings, this is without doubt also a

¹¹ Proceedings against the decision of the Competition Agency have been initiated by the bus operators before the Administrative Court of the Republic of Croatia. The judgment is still pending.

¹² However, the "promemoria" document (which was not available as evidence in the proceedings but was only indirectly mentioned in other pieces of material evidence, i.e. the fax message with instructions for bus stations) could probably be considered as a written cartel agreement.

case in which the conduct of competitors can be described as “explicit collusion.” In this case, the Competition Agency was able to conclude from “fragmentary evidence” that there has been a breach of competition rules, including statements of some of the parties which confirmed their involvement in a cartel agreement, and some telling written evidence of illegal parallel behavior (identical fax messages sent individually by all cartel members to bus stations). Indeed, it was possible to prove that anticompetitive contact had taken place among competitors and this trumped any arguments of innocent parallel behavior (although this kind of argument was not entertained by the accused parties).

B. Active Role of Trade Associations

Among the analyzed cases there is not one in which participating undertakings were not assisted by their trade association in their cartel behavior. Admittedly, in some cases it was difficult to ascertain from the text of the decision exactly what kind of involvement was taking place. The reason for this probably lies partly in the fact that the liability of association of undertakings was not being invoked by the Agency in any of the cases and that the Agency was not interested in determining the exact role of the trade association. However, in two cases (Demining Operators case, Bus Operators case) the active role of associations in the cartel was so obvious that the lack of reaction of the Agency in this regard must be seen as incorrect application of substantive law.

In the Demining Operators case, as can be seen from the facts of the case as described above, it was the trade association that provided for a mechanism to punish undertakings which deviated from the collusive agreement. The promissory notes that undertakings were supposed to issue as collateral in case of breaching the cartel agreement were to be deposited in the association’s bank. Also, the executive committee of the association was to establish a three member board which had to adopt a decision in favor of undertakings that suffered damage from the “cheating” behavior of other competitors and a decision to collect compensation on the basis of the deposited promissory notes.

In the Bus Operators case, as can be seen from the facts of the case as described above, the role of the trade association was to calculate the most appropriate price which could then be charged by undertakings, which took into account rising costs and other negative market trends. In addition, regular meetings of competitors were organized by the association in which association employees were given the task of making minutes of the meetings.

C. Self-incriminating Statements

During the proceedings in the above described cases, undertakings frequently gave self-incriminating statements before the Competition Agency. For example, in the

Bus Operators case one of the accused undertakings voluntarily explained that they (i.e. competitors) had regular meetings in the trade association where they discussed and “coordinated their behaviour as regards issues of transport security, terms of provision of services, the issue of fuel, and of course ... the price of services.” He reasoned that since the road transport of passengers was a “sensitive” and “specific” industry this kind of communication among competitors was without doubt necessary. Furthermore he pointed out to the fact that there existed among the service providers in this industry a “long-term practice of business communication, exchange of information and experience, commercial analysis etc.”

In the Demining Operators case the undertakings accused of concluding a cartel agreement argued to their defense that the circumstances on the market were quite unfavorable and that their goal was to secure “survival on the market and an evenly distributed utilisation of capacity,” as well as to stop “prices of demining services from falling.”

From these typical examples we can not only observe that collusion is seen by competitors as a remedy for negative market trends but what is also striking is their ignorance of the existing competition rules. It seems that appropriate legal advice has not been given to the undertakings against which the Competition Agency started proceedings. However, this must be taken as an indication of weak cartel enforcement—why do we need to be aware of the competition rules, when no consequences follow.

V. CONCLUSION

Cartels on the Croatian market are no different from the cartels in any part of the world. However, there are parts of the world where the fight against cartels is more efficient than in Croatia. It is true that to achieve effective cartel enforcement takes time and resources, and the efforts invested so far by the Competition Agency are not insignificant. Also it is true that the current competition rules prevent the war against cartels to be waged in full: the Agency has no competence to decide on fines and there are no legal rules that provide for leniency. This is still an early phase of enforcement of competition rules in Croatia. It has been a bit more than a decade now since the Agency was established and some crucial legal instruments are still missing from the competition legislation. But once new, improved legislation is passed (which is expected in 2009) the list of excuses will be shorter and shorter. Weak competition culture may only be remedied by vigorous enforcement: this means “big” cases and significant fines. Unfortunately, this will lead to the more or less abrupt disappearance of the remarkable self-incriminating statements produced by the accused undertakings. May we live to witness this!