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Prohibited Agreements of Competitors on Prices and their Particularities in Marinas Cartel Case in the Republic of Croatia

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Overview of the Croatian competition rules

- The first Croatian Competition Act (1995)- drafted under influence of EC competition law, the Competition Agency was established, started to work in 1997.
- Stabilisation and Association Agreement (SAA) between Croatia and EU (2001) introduced an obligation for Croatia to harmonise its domestic legislation with the *acquis*, Article 69.
- The second Competition Act (2003)- further harmonisation with the *acquis*.
- The third Competition Act (2009)-introduces possibility of leniency, gives power CA to directly fine the undertakings for breach of competition rules-changed in 2013 in order to fulfil its obligation as a Member of the EU.

Characteristics of the cartel agreements

- Cartels forms of explicit collusion where competitors explicitly fix prices or output, divide markets or customers, exchange commercially sensitive information, etc.
- Explicit forms of cooperation-communication between undertakings on variables crucial for competition → proof that an agreement has been concluded → application of competition rules
- Cartels have adverse affect on consumers welfare, their right to lower prices, higher quality of goods and services and their choice → level of efficiency of the economy, redistribution of economic resources, level of employment, welfare of the society as a whole.
- Hard-core restrictions of competition law- illegal *per se*, no analysis of their effects on market is needed.



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*Competition Act of the Republic of Croatia (OG 79/2009, 80/2013), Art.8
prohibits cartel agreements and considers them to be *ex lege* null:

“agreements between undertakings, decisions by associations of undertakings, coordinated practice... which have as their object or effect distortion of competition... in particular those by which undertakings determine directly or indirectly purchase or sale prices, or other commercial terms.”

Effective enforcement of cartel rules

- **PROBLEMS:**

1. Competition Agency had no power to pronounce fines until 2009- locally competent misdemeanours court on its request.
- Legality of the decision- controlled by the Administrative Court of the Republic of Croatia -Misdemeanours courts often postponed decision on fine until the decision of the Administrative Court was brought-period of prescription → no preventive effect of the sanction.
2. Absence of appropriate leniency program until 2009 –leniency system the most effective tool in discovering cartels. Leniency policy offers companies involved in a cartel which self-report and hand over evidence either total immunity from fines or a reduction of fines. First application for leniency in 2015.

3. Competence to carry out surprise inspections of business premises, including computers, servers and other electronic devices of the CCA was restricted due to lack of computer forensics equipment and limited budgetary resources for the purchase of such equipment.
- CCA competence to carry out surprise inspections was established in 2003.
 - **In 2014 ?!** Ministry of Finance approved resources from the budget for digital forensic equipment and training of Agency experts → Significant rise in the number of conducted surprise inspections of the business premises, land and means of transport, compared with the previous periods.
 - **CONSEQUENCES:** small number of cartel cases, weak implementation of competition law, overall higher level of prices in Croatia in comparison to other EU Member States.
 - **MEASURES** for better implementation submitted by Croatian theory of competition law-opening up „big” cases, severe fines for undertakings involved in cartels.

„Marinas Cartel”

- The proceedings against Croatian Chamber of the Economy and 9 members of the Croatian Association of Nautical Tourism (the Adriatic International Club, Tehnomont, Marina Šibenik, Ilirija from Biograd, Marina Hramina from Murter, Shipyard and Marina from Betina, Marina Punt, Marina Dalmacija and Marina Borik from Zadar).
- The CCA established that the representatives of the marinas who participated in the meeting of the Council of the Croatian Association of NT under the aegis of the Croatian Chamber of the Economy in October 2012 in Biograd n/m exchanged information relating to future pricing policies for berthing services. CCA fined parties of the cartel in total amount of 2.263 000 Kuna.
- President of the Association announced that in 2013 they would not raise the prices of their services whereas these who “would raise the prices, would do so merely by the percentage of inflation in the Republic of Croatia”.



* CCA -no explicit agreement on the price increase, strategic information on future pricing had been exchanged this reduces strategic uncertainty as to the future operation of all the competitors involved and increases the risk of limiting competition-**concerted practices** facilitating collusion.

- When a company participates in a meeting where strategic information are exchanged and receives such strategic data from a competitor, it is presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data and immediately leaves the meeting- concerted practice facilitating collusion of all the participants in the meeting.

Joined cases C- 204 etc., *Aalborg Portland AS v Commission*, (2004) ECR I-123, par.81-86.

- The representatives of the marinas (except marina Tehnomont) claimed that they **did not hear the statement** of the president of the Association for NT and did not receive the note from the meeting by e-mail.
- Preliminary investigation of the relevant market and collection of data was conducted in year 2013- because of lack of computer forensics equipment, CCA was unable to establish **whether marinas received the note from the meeting** in Biograd n/m by surprise inspections of computers and servers of marinas.
- Whether strategic information on future pricing is received by marinas?
- Not established by CCA.



Administrative Court of the Republic of Croatia in decision Usll-39/15-10, 17 March 2016 ordered to CCA to determine whether parties received the note from the meeting in Biograd n/m in October 2012 of the Council of the Croatian Association of NT by e-mail ?!



Decision of the CCA, UPI/I 034-03/13-01/047 Urbroj: 580-09/74-2017-225, 16 February 2017,

3 years after beginning of the proceedings !

Suspension of the proceedings.



Conclusion

- Recommendations for more effective enforcement of cartel rules- additional resources needed- CCA more efficient in discovering cartels in Croatia.
- DELICROMAR project – interviews with almost all marinas concessionaries in Croatia.
- „Marinas cartel”- result of the ignorance of the existing competition rules, weak competition culture.
- *Ignorantia iuris nocet* !
- Meetings of competitors always lead to collusion ?

Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 1976. ?

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Enhancing Competitiveness, Safety, Security and Marine Environmental Standards*



www.delicromar.hazu.hr

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