

Class: UP/I 034-03/13-01/010
Reg.no. 580-09/84-2015-068
Zagreb, 26 November 2015

Case: CCA v Hrvatska pošta d.d.

- Initiative made by City Ex d.o.o. for alleged abuse of a dominant position

Decision: Non-infringement decision stating that Hrvatska pošta was not engaged in predatory conduct and therefore did not abuse its dominant position

Case summary:

The Croatian Competition Agency (CCA) found that Hrvatska pošta (Croatian Post; HP) did not distort competition in the provision of letter services in Croatia. In the course of the proceeding the CCA did not find evidence that after 1 January 2013, the point of the full liberalization of the letter market in Croatia, HP implemented predatory pricing policy with the exclusionary abuse objective or anticompetitive foreclosure, in other words, there was no evidence that it was engaged in a predatory conduct with the objective of excluding the existing competitors from the relevant market and deterring entry of new operators. The proceeding was carried ex-officio following the complaint of City-Ex stating that HP was allegedly involved in predatory pricing.

The decision of the CCA particularly took into account the fact that the provision of letter service, and predominantly the universal postal service as a part of this market, is explicitly regulated and as such constitutes the subject of ex-ante statutory regulation falling under the competence of the sector specific regulator – the Croatian Regulatory Authority for Network Industries (HAKOM).

In other words, the Postal Services Act regulates in detail the setting of the price of universal postal service that for the equivalent letter service must be equal for all the users of postal services in the whole territory of Croatia. Besides, in order to ensure sound management of the universal service, the tariffs applied to the universal service should be objective, transparent, non-discriminatory and geared to costs. The tariff for postal service must be made public and the postal service provider must communicate it to the HAKOM before it enters into force.

On the other hand, under the Postal Services Act, the HAKOM safeguards and regulates the price of the universal service where it finds that the price is in contravention with the Postal Services Act, based on its decision it may in full or partly revise or revoke the price of universal service, before or after it has been published.

The CCA found that HP communicated the tariffs (price of postal services) to the HAKOM. The communicated tariffs also contained rebates (discounts) that are given by HP to the users of its service who send a higher amount of deliveries. This rebate policy is in line with the postal provisions but only as long as the rebate is defined taking into account the costs, it is applied equally to all service users who send letters under the similar conditions and it is foreseen in the universal service tariffs. In that sense, the CCA found that the postal service tariffs provided by

HP as well as the universal service rebates which are a constituent part of the tariffs had been adopted pursuant to postal regulation in force.

In spite of a certain overlapping of the content of the postal services regulation in the part relating to setting the price of universal service and the provisions of the Competition Act in the part relating to predatory pricing, and consequently, the convergence of the jurisdiction of the HAKOM as specific regulator and the CCA as the general regulator in competition issues, the CCA carried out a comprehensive legal and economic analysis within its scope of competence in the proceeding in question.

Frist of all, the CCA established that in the period from 1 January 2013 onwards HP holds a dominant position in the relevant market defined as the provision of letter services in Croatia.

Special analysis was carried out in the part of the market involving letters of up to 50 gram that was on 1 January 2013 opened to competition. Although HP undeniably holds a dominant position in this market, the results of the comparative analysis of the market structure and the market position of HP as the postal historical operator (incumbent postal operator) showed that HP holds a significantly lower market share compared with the similar incumbent operators in other national EU member states' markets, despite the fact that these national markets have been liberalized earlier.

The CCA also assessed the agreements that have been entered into between HP and big users, such as banks, telecom operators and public undertakings, particularly in respect of prices and discounts. The results of this assessment indicated that the prices and discounts given by HP to the users of universal postal service that send more letters were in compliance with the tariffs set by HP.

Besides, in the course of the proceeding the CCA analysed whether the criteria were cumulatively fulfilled that are necessary to provide evidence that the allegedly abusive conduct is likely to lead to anti-competitive foreclosure in accordance with the EU acquis and the case practice of the European Commission upheld by the rulings of the European Court of Justice.

The first criterion is evidence showing that a dominant undertaking engages in predatory conduct by deliberately incurring losses or foregoing profits in the short term (so called „sacrifice“). The second criterion is evidence of a strategy to exclude competitors, such as a detailed plan to engage in certain conduct in order to exclude a competitor, to prevent entry or to pre-empt the emergence of a market. The third criterion is possible selectivity of the conduct in question where the dominant undertaking may apply the practice only to selected customers, thereby enhancing the likelihood of anti-competitive foreclosure. The fourth criterion is that the predator will be able to raise the price above the competitive level (recoupment capability) once it has forced the competitors to exit the market or deter entry and expansion by competitors, thereby increasing or maintaining its market power in the long run.

In order to provide an answer to the first question, as to whether HP deliberately incurred losses or forewent profits by short-term price cutting, the CCA carried out the price-cost test on the basis of the HP Regulatory Report using the method predicated on ex-ante market regulation and subsequently verified by an independent auditor and the HAKOM.

The results of the price-cost test showed that HP revenues covered its costs. Concretely, the realized revenues cover HP costs both with respect to individual items and the whole group of letter services whereas HP generates positive gross margin in all letter postal services.

On the other hand, the CCA found no direct or indirect evidence that would indicate a strategy or a plan to exclude competitors from the market.

Similarly, no selectivity was found where the dominant undertaking would relying on a unilateral conduct apply the practice only to selected customers. The discounts given by HP were defined in its publically available postal rates.

Finally, there was no evidence found by the CCA that HP, in almost three years from the date of the full opening of the letter service in Croatia, would subsequently raise the price of service for the universal service users that send more items, so as to compensate for the losses incurred due to the alleged short-term price cutting.

In conclusion, the CCA found that the above criteria that are necessary to provide evidence that the allegedly abusive conduct lead to anti-competitive foreclosure have not been cumulatively met in the case at issue.

Note, that in this particular case the CCA did not decide on the allegations made by City-Ex in its complaint as regards the application of other provisions, such as the provisions regulating public procurement, State aid issues, taxes regulations and application of postal regulations, given that the application of these provisions falls under the scope of other authorities, such as the Ministry of the Economy, the Ministry of Finance and the European Commission, the Ministry of Finance and the Tax Administration and the HAKOM, respectively.

Explanation on termination of the proceeding on the basis of Article 102

The proceeding against the undertaking HP was initiated on the basis of the parallel or consecutive application of the national competition law (Croatian Competition Act) and Article 102 of the Treaty on the Functioning of the European Union (Treaty)

In accordance with the case law principle established by the European Court of Justice, a national competition authority cannot take a negative decision (a decision on non-infringement of competition rules) within the meaning of Article 102 of the Treaty, in other words a national competition authority is precluded from taking a negative decision on the merits when applying Article 102 of the Treaty, which might prevent the Commission, or other NCAs, from subsequently establishing an infringement of Article 102 Treaty. Consequently, such a practice would

jeopardise the fundamental importance of the uniform application of EU competition law and the concept of coherence.

Given that the national competition authority – the CCA – could not take a decision finding that a practice does not restrict competition under Article 102 Treaty in the case in which it has found, after conducting proceedings, that the undertaking did not breach the prohibition of abuse of a dominant position under that Treaty provision, concretely, in this particular case the criteria for predatory conduct have not been cumulatively fulfilled by the undertaking holding the dominant position in line with Article 13 of the Competition Act, it terminated the proceeding against HP or closed the proceeding without taking a negative decision on the merits i.e. by deciding that there are no grounds for action on its part, in the sense of the principle of supremacy of the EU law that allows EU law to take precedence over the provisions of the national law and the established case law of the European Court of Justice.