Class: UP/I 034-03/2013-01/007
Reg.no: 580-10/76-2018-109
Zagreb, 14 November 2018

CCA vs. Hrvatski Telekom d.d., Zagreb
- Alleged abuse of a dominant position

Decision on non-infringement of competition rules

Case summary:

Following the initiative of the undertaking H1 Telekom d.d., from Split (H1), the CCA found in the case carried out against the undertaking Hrvatski Telekom d.d., from Zagreb (HT) that within the meaning of Article 13 of the Competition Act, OG 79/09 and 80/13 the latter did not infringe competition rules and did not abuse its dominant position in the following relevant markets: call origination on the public telephone network provided at a fixed location, access to public telephone network at fixed locations for residential and non-residential customers, wholesale (physical) network infrastructure access (including shared or fully unbundled access – local loop unbundling) at a fixed location and wholesale fixed broadband access services in the territory of the Republic of Croatia, in the period from 2011 to 17 December 2014.

The complainant H1 basically stated in its initiative for the initiation of the infringement proceeding against the undertaking HT that in 2012 it spotted a significant fall in the number of its customers that had been allegedly acquired by HT by using the H1 customers data and engaging in the active sales of its retail services to H1 customers despite the fact that the very same services had been already sold to H1 customers at the wholesale level and that H1 had already communicated its customers data for the purpose of the realisation of the wholesale services. The complainant also stated that HT stalled the realisation of these wholesale services. What is more, in the view of H1, HT has been actively “attacking” the H1 customers by abusing the wholesale customer base of H1 that was available to HT for the purpose of its retail campaigns targeted at H1 customers. Finally, H1 alleged in its initiative that the HT used the above practices not only with H1 but also with other alternative operators.

Following the preliminary market investigation in which the CCA thoroughly examined all the evidence and carried the necessary market analyses and reviewed the additional comments, data and documentation requested and received from H1, HT, other telecom operators, the specific regulator Croatian Regulatory Authority for Network Industries (HAKOM) in the infringement proceeding and taking into account the relevant EU case law and comparative law and practice, no evidence has been established that HT refused to provide wholesale services to alternative operators, in other words, no evidence was found that HT applied more favourable conditions in the provision of wholesale services to its connected company

than to other alternative operators with respect to the alleged stalling in the provision of the wholesale services in the sense of exclusionary abuse or practice and market foreclosure.

Further, in line with Article 2a and Article 74 of the Competition Act regulating the application of criteria arising from the application of competition rules applicable in the European Union and the interpretation of the Court of Justice of the European Union (CJEU) regarding Article 5 paragraph 2 of the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, the CCA decided to terminate the proceeding against HT in the part that was initiated within the meaning of Article 102 TFEU.

In the explanation of its decision the CCA stated that in the ex officio proceeding it was first necessary to establish whether HT holds a dominant position in the markets concerned and whether in this concrete case it abused its dominant position within the meaning of Article 13 of the Competition Act and Article 102 TFEU, in other words, whether HT applied more favourable conditions to its connected company Iskon than to other alternative operators and if HT refused to provide the wholesale services to alternative operators and stalled the provision of these services with the objective of exclusion of the competitors from the market and market foreclosure.

The infringement proceeding based on the alleged distortion of competition in the form of abuse of a dominant position was initiated against HT within the meaning of Article 13 of the Competition Act regarding its practices in the period from 2011 to 17 December 2014, whereas the period form 1 July 2013 to 17 December 2014 was taken as relevant in the part of the proceeding that was initiated within the meaning of Article 102 TFEU.

The relevant markets in this case have been defined as: call origination on the public telephone network provided at a fixed location, access to public telephone network at fixed locations for residential and non- residential customers, wholesale (physical) network infrastructure access (including shared or fully unbundled access – local loop unbundling) at a fixed location and wholesale fixed broadband access services in the territory of the Republic of Croatia.

Taking into account the fact that HT as a historic telecommunication operator that is in line with ex ante market regulation and the electronic communications rules defined as the operator with significant market power in the defined relevant markets and that this has been established in compliance with the basic principles of competition law in the previous opinions given by the CCA in cooperation with HAKOM, it has been established that HT holds a dominant position within the meaning of Article 12 of the Competition Act in all above mentioned relevant markets.

This case has been assessed within the meaning of Article 13 item 2 of the Competition Act and Article 102 (b) TFEU and the principles under the Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings OJ C 45, 24.2.2009, and applying the criteria arising from the application of competition rules applicable in the European Union provided by Article 74 of the Competition Act.

In the particular case no direct evidence has been found that would support the allegations of the existing anticompetitive strategy of HT that would have as its object restriction of competition.

It must be noted here that the CCA regarded the decisions made by the specific regulator and the competent courts with respect to HT exclusively in light of competition concerns, concretely, the CCA assessed whether there was a cumulative effect of ex ante infringements under the specific rules and if this can be regarded as indirect evidence of part of the HT behaviour to alternative operators in the provision of wholesale services. The mere ex ante infringement of specific rules does not automatically mean that competition rules have been indisputably violated.

As regards the decisions of HAKOM of 6 April 2011 regarding the publication of the standard offer and the time of the conclusion of the framework agreements on the lease of customer's line, all the decisions of HAKOM have been annulled by the High Administrative Court of the Republic of Croatia. Therefore these decisions could not be taken as sufficient circumstantial evidence let alone as indirect evidence of the existence of the HT strategy for treating the alternative operators that would have as its object restriction of competition. No evidence or indications with respect to stalling in the conclusion of the leased line services has been found.

At the same time there has been no evidence that Iskon – a connected company of HT enjoyed a more advantageous position and had been offered more favourable conditions than other alternative operators.

Based on the analysis of the wholesale services, not only were there no indications that would point at the fact that Iskon as a connected company of HT was put into a more favourable position than other alternative operators but the time spans for the realization of the wholesale services and for the elimination of disruptions in the use of the wholesale services indicated to be comparatively similar. The same was found with respect to the alleged stalls in services and troubleshooting as found in the *Commission decision against Telekomunikacja Polska.* Other delays in the provision of services in this case have been objectively and justifiably reasoned by HT. The issue of customer migration included a negligent number of customers and as such represented no sample that would suffice to conclude that HT had been abusing its dominant position in the relevant market concerned.

Taking everything mentioned above into consideration it was reasonable to conclude on the basis of the established facts of the case that HT did not distort competition in the relevant market concerned within the meaning of Article 13 of the Competition Act.

With reference to the part of the case that was opened within the meaning of Article 102 TFEU and terminated based on the decision brought by the CCA it must be noted that this decision was adopted by adequately applying the criteria under the EU law as stipulated by Article 2a and Article 74 of the Competition Act and in line with the relevant provisions under the Council Regulation (EC) No 1/2003 – Article 5 paragraph 1 providing that the competition authorities of the Member States shall have the power to apply Articles 81 and

82 of the Treaty in individual cases, and for this purpose, acting on their own initiative or on a complaint, they may take the following decisions: requiring that an infringement be brought to an end, ordering interim measures, accepting commitments and imposing fines, periodic penalty payments or any other penalty provided for in their national law, and Article 5 paragraph 2 providing that where on the basis of the information in their possession the conditions for prohibition are not met the national competition authorities may likewise decide that there are no grounds for action on their part.

Consequently, the national competition authorities are not empowered to adopt any other decisions than the ones specified in Article 5 of the Council Regulation (EC) No 1/2003.

In accordance with the case law principle established by the European Court of Justice in case C-375/09 - Tele2 - *Polska Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., devenue Netia SA*. of 3 May 2011, 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 TFEU, which might prevent the Commission, or other NCAs, from subsequently establishing an infringement of Article 102 TFEU. Consequently, such a practice would jeopardise the fundamental importance of the uniform application of EU competition law and the concept of coherence.

One of the main principles of the EU legal regime arising from the case law of the CJEU in case *Flaminio Costa v ENEL* (1964) established the supremacy of European Union law over the laws of its member states' obliging the legislator to substantially bring the national law into compliance with the EU legal system.

The afore said was also confirmed by the ruling of the High Administrative Court of the Republic of Croatia in case CCA v Hrvatska pošta d.d. Case UsII-15/16-19, of 22 September 2017, upholding the decision of the CCA in case Class: UP/I 034-03/13-01/010, of 26 November 2015. 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 and terminated the proceeding 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. By upholding this decision of the CCA the High Administrative Court of the Republic of Croatia accepted the interpretation of Article 5 paragraph 2 of the Council Regulation (EC) No 1/2003.

In addition, the principles of direct effect and supremacy of the EU law over the national law are incorporated in Article 145 of the Constitution of the Republic of Croatia.

In addition, in the context of direct applicability of the EU law as found in the ruling of the European Court in case *Amministrazione delle Finanze dello Stato v Simmenthal SpA*. point 21 “every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set

aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule. Further, the ruling closes: “A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means”.

Taking the afore mentioned into account after the CCA decided that HT did not distort competition in this concrete case within the meaning of Article 13 of the Competition Act it terminated the proceeding against HT or closed the proceeding without taking a negative decision on the merits within the meaning of Article 102 TFEU, 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 in accordance to which the national competition authorities are not empowered to take a non-infringement decision in the sense of Article 102 TFEU.