

Summary of the Annual Report of the Croatian Competition Agency for 2013

Pursuant to the Competition Act (OG 79/2009 and 80/2013) Croatian Competition Agency (CCA) is a legal person with public authority which autonomously and independently performs the activities in the scope of its competence under the above mentioned Competition Act, 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, 04.01.2003, relating to the implementation of Articles 101 and 102 of the Treaty on the Functioning of the European Union, OJ C 115, 09.05.2008, and Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.01.2004. The CCA reports annually to the Croatian Parliament.

The legal framework providing for the rules and establishing the competition regime in the Republic of Croatia involves besides the Competition Act ancillary implementing provisions that have also been adopted pursuant to the Competition Act.

From October 2003 until 30 June 2013 the CCA was also in charge of State aid in Croatia – its authorisation, control and recovery of unlawfully granted or illegally used State aid in line with the State Aid Act then in force and implementing rules adopted on the basis of the State Aid Act. After the EU accession on 1 June 2013 the exclusive competence for State aid was, naturally, assumed by the European Commission, whereas the Croatian Competition Agency as of that date continued in the advisory role in this area consisting primarily of providing support to aid providers in the form of opinions on the compliance of the proposed State aid measures with the State aid rules before the notification to the European Commission. The CCA also notified State aid to the Commission, reported on granted State aid in Croatia etc. Under the new State Aid Act adopted by the Croatian Parliament on 4 April 2014 (OG 47/2014) the Ministry of Finance as the central public administration authority was given the sole competence in the area of State aid. All the employees of the CCA responsible for State aid were transferred to the Ministry of Finance. This, however, did not affect the autonomy and independence of the Croatian Competition Agency in regard to its core activities relating to antitrust and merger control under the Competition Act which the CCA has been implementing since its establishment in 1995 and the beginning of its operational activities in 1997 when it was granted resources for its functioning from the State budget.

The competence of the CCA specifically in the area of competition covers the following:

- establishment of **prohibited agreements between undertakings**,
- establishment of **abuse of a dominant position of undertakings**, and
- assessment of compatibility of **concentrations between undertakings**.

The mission of the Agency is to help the market to function better for the consumers, undertakings and the economy as a whole by removing the barriers, weaknesses and restrictions that hinder the forces of competition on the free market and by strengthening of competition culture. The practice in developed countries indicates that effective competition facilitates the creation of the conditions for economic growth based on competing markets, efficient allocation and use of limited resources, innovation and investment.

Pursuant to the mandatory regulations the CCA submits the annual report on its work in the preceding year to the Croatian Parliament. The Annual Report of the CCA for 2013 provides for a detailed description of its activities and decisions in the report year.

Unlike any year before 2013 was marked by noteworthy changes for the CCA.

First, the accession of the Republic of Croatia to the EU on 1 July 2013 meant the **change of competence for the national competition authority**. The Act on the Amendments to the Competition Act that entered into force on 1 July 2013 significantly widened the authority of the CCA empowering it for the **direct application of the EU acquis** in the area of competition. In other words, the CCA implements the provisions of the Croatian Competition Act and at the same time Articles 101 and 102 of the TFEU. Concretely, in the proceedings establishing prohibited agreements between undertakings or abuse of a dominant position by an undertaking or undertakings in a **system of parallel powers** the national competition authority – the CCA in Croatia – alongside with the national legislation (Article 8 and/or Article 13 of the Competition Act) may directly apply Articles 101 and/or Article 102 of the TFEU in the case of infringement of competition rules producing significant effects on trade between the Republic of Croatia and one or more Member States. On the other hand, where the CCA assesses that the distortion of competition in question has no effect on trade with other Member States, it will exclusively apply the national law. This means that on the accession date competition matters in Croatia became a part of the competition regime in the internal market of the EU which is enforced concurrently by the Croatian competition authority, Croatian courts (High Administrative Court of the Republic of Croatia and competent commercial courts) and the European institutions – the European Commission, the General Court and the Court of Justice of the European Union.

The above mentioned system of parallel powers means as of 1 July 2013 for the CCA obligatory cooperation between the CCA and the national competition authorities of the Member States and the European Commission through **the European Competition Network (ECN)**. Through the ECN, the competition authorities exchange information on the proceedings carried out against undertakings that allegedly enter into prohibited agreements or abuse a dominant position and thereby infringe Articles 101 or 102 of the TFEU. They carry out joint surprise inspections or assist one another in carrying out inspections, or do so on behalf and for the account of the competition authority of another Member State or the European Commission. In the proceedings carried out pursuant to Articles 101 and 102 TFEU the CCA must inform the European Commission of the proposed

decision before it is made final, whereas if the Commission initiates its own proceedings in the same matter, the CCA is automatically relieved of its competence.

In the area of merger control the Croatian undertakings must notify the implementation of the proposed concentration to the European Commission where the criteria stipulated under the EC Merger Regulation are fulfilled. However, where the Commission decides not to assess a particular concentration despite the fact that the concentration is a concentration with an EU dimension, the appraisal of the concentration at issue may be entrusted to the CCA.

As of 1 July 2013 the **CCA became empowered for the application of competition law in the banking sector – involving credit unions and credit institutions** whereby within the meaning of the Act on Credit Institutions the latter may be established as banks, savings banks and building societies. In other words, on the day of the EU accession the Croatian National Bank lost the competence in the area of competition in the banking sector after eleven years and this power was resumed by the CCA.

On the other hand, a significant change of competence happened for the CCA itself in the area of State aid. As previously mentioned, whereas the granting, monitoring and recovery of State aid in line with Article 107 of the TFEU fell exclusively under the scope and competence of the European Commission, the CCA remained in its advisory (relating to aid providers and aid beneficiaries) and its liaison role (relating to the communication with the Commission) until **24 April 2014 when the Ministry of Finance became solely in charge with State aid** issues on the national level.

The changes listed above caused a **substantial increase in the scope of the activities of the CCA** in 2013.

At the same time, after 10 years there have been some **changes in the CCA leadership**. Note that the CCA is run and managed by the Competition Council consisting of 5 members who are appointed and relieved from duty by the Croatian Parliament upon the proposal of the Government of the Republic of Croatia. The conditions for the appointment and term of office of the members of the Competition Council, for relieving of the president and the members of the Competition Council and the scope of competence of the Competition Council are regulated by the Competition Act. On 15 October 2013 the Croatian Parliament adopted the decision on the basis of which the previous president of the Council Mrs Olgica Spevec and the members of the Council Mrs Mirna Pavletić-Župić and Mr Milivoj Maršić were relieved from duty. **On 15 November 2013 the Croatian Parliament adopted a decision appointing Mr Mladen Cerovac president of the Council**, Ms Ljiljana Pavlic, Mrs Tatjana Peroković and Mr Denis Matić members of the Council. Ms Vesna Patrlj was appointed member of the Council for a new five-year-term of office.

The CCA **enforcement record for 2013 indicates a total of 680 decisions or 70 per cent more than in 2012** when 390 decisions were taken. What is more, the increase was achieved by less staff than in 2012.

What mostly influenced the rise in the scope of activities and increased the number of decisions was the above mentioned change in competence due to the EU accession, particularly regarding the **notification and assessment of compatibility of concentrations**. Namely, in line with the EC Merger Regulation and within the ECN cooperation, under the rules governing the referral of concentrations from the Commission to Member States and in line with the submission procedure, well placed authority to deal with the case is decided.

In a six-month-period only – from 1 June 2013 to the end of the report period – there were **145 notifications** submitted from the European Commission examined by the CCA in the referral procedure.

On the other hand, if these 145 notifications were deducted from the total number of cases the CCA solved in 2013, **the number of solved cases in the area of competition (antitrust and merger control) still indicates the rise of efficiency of the CCA compared to the previous year of 2012 by 30 per cent.**

The number of **solved cases in the area of State aid also rose** – both in the period before the EU accession on 1 July 2013, when the CCA had to close a number of pending cases, and in the period following the 1 July 2013, when the CCA took the advisory and intermediary role at the national level in regard to State aid. In the latter period alone the CCA gave **107 opinions and comments on aid schemes and individual aid.**

When compared to the year 2012, the figures indicate a **rise in the number of solved cases in the area of State aid in 2013 by 46 per cent.**

In 2013 the CCA traditionally produced a large number of opinions and other statements within its **competition advocacy** activities. There were **144 such opinions in the area of antitrust and merger control**, whereas together with the opinions in the area of State aid this number climbed to 251 opinions, plus miscellaneous comments, letters and replies from the CCA given to public administration authorities and undertakings and other interested parties.

What particularly must be mentioned in the 2013 CCA report is the rise of actions that need to be taken during the **preliminary investigations in the relevant market** of each particular case handled by the expert team. In these preliminary investigations, with the view to defining competition concerns on the basis of which it initiates the proceedings, the CCA analysed more than 70 markets.

As mentioned before, the activities in the area of merger control marked the work of the CCA in 2013. Compared with 2012, when only five concentrations had been notified, in 2013

the CCA **received notifications for appraisal of 20 concentrations, which is a rise of 300 per cent.** Given that the notification obligation depends on the objective criteria and that CCA has no influence on the number of submitted notifications of concentrations, such a significant increase is the result of the restructuring and consolidation processes on the markets in the real sector in the Republic of Croatia. This trend converges also the trend in the EU internal market. Out of 20 proposed concentrations in 2013, one notification was dismissed on the account of the fact that the criteria for the notion of concentration were not fulfilled, whereas three concentrations were assessed in the second phase.

In the second phase of the appraisal of a concentration the CCA carries out in depth investigation, both legal and economic, of the effects of the concentration concerned on competition. Where the CCA in this Phase II establishes that the concentration may be declared compatible only if certain conditions and obligations, within certain time limits, are met, the notifying person must **offer commitments**, behavioural and/or structural commitments in order to eliminate the anticompetitive effects of the concentration concerned. Where the CCA establishes that the offered commitments are not sufficient for the elimination of the negative effects of concentration or where the notifying party fails to offer commitments altogether, the CCA shall prohibit such a concentration.

In one case dealing with appraisal of a concentration, out of three that were assessed by the CCA in 2013, namely, in the case *Tisak d.d., Zagreb / iNovine d.d., Zagreb*, an in-depth investigation was opened due to potentially significant effects of the proposed concentration on competition. However, after the CCA submitted serious concerns relating to the anticompetitive effects of the concentration in question, the parties withdrew their prior notification. At the same time, the commitments offered by the undertakings were assessed by the CCA as inadequate and it was prepared to take a decision prohibiting the concentration concerned after the assessment in Phase II. However, the notifying parties decided to cease to proceed with the implementation of the concentration in question and the CCA brought the decision on termination of the proceedings in this case.

In the remaining two cases in the second phase of assessment of the concentrations between the undertakings *HT/Optima* and *Agrokor/Mercator* despite the fact that the formal decisions were made in the first quarter of 2014, the CCA carried most demanding in-depth investigations regarding these two cases during 2013. In both cases the CCA established in the course of the proceeding involving the assessment of compatibility of the concentrations concerned that both concentrations may be declared compatible, yet, provided that serious commitments are offered by the parties to the concentrations. Consequently, the notifying parties offered the commitments to remedy anticompetitive effects on competition which were accepted by the CCA.

In absolute compliance with the EC practice and the practice of the most national competition authorities the activities of the CCA in 2013 were in the first place aimed at **restoring competition on the basis of commitments offered by undertakings at an early**

stage of the proceeding. The advantage of such commitments is that they quickly restore possible distortions of competition. There were four such cases in 2013 where the CCA accepted the commitments offered by the undertakings that both the CCA and other players on the market in question accepted after the analysis of the relevant market, the market test and the public invitation for comments were all carried out. The cases in which anticompetitive effects were eliminated and competition was restored on the basis of the commitments tool were, for example, the measures undertaken by the undertakings in *CCA v Hrvatska radiotelevizija*, *CCA v Grand auto d.o.o.*, *CCA v Brodogradilište Viktor Lenac d.d.* etc.

It must be noted that in 2013 a number of proceedings was opened in which the majority of steps were carried out in the cases involving **establishment of distortion of competition on the basis of alleged restrictive (prohibited) vertical agreements**. In each particular case it had to be established if it contains restrictive provisions within the meaning of competition rules, such as imposing the minimum wholesale and retail prices or RPM and other provisions and obligations which restrict sales and therefore are prohibited (*CCA v Dukat d.d., Zagreb and Konzum d.d., Zagreb*, *CCA v Kraš d.d., Zagreb and NTL d.o.o., Sesvete*, *CCA v Kutjevo d.d., Kutjevo and KTC d.d., Križevci*, *CCA v Carlsberg Croatia d.o.o., Koprivnica and KTC d.d., Križevci*, *CCA v Viro tvornica šećera d.d., Virovitica and Konzum d.d., Zagreb*, *CCA v Viro tvornica šećera d.d., Virovitica and Stridon-promet d.o.o., Dugo Selo*). Notably, the above cases relating to establishment of allegedly restrictive practices relating to agreements between certain manufacturers (or suppliers) and retailers were opened in 2013 on the basis of the data the CCA collected within its **regular sector inquiry covering the distribution and retail market in the Republic of Croatia** (market research in food, beverages and sanitary products distribution including wholesale and retail of the products concerned). The data so obtained are quantitative indicators of the market situation that are used by the CCA in the first place in the assessment of compatibility of concentrations.

In 2013 report the CCA points out again its **decisiveness in fighting cartels** also in the future.

Disclosure and sanctioning of cartels has been set as one of the priorities in the work of the CCA taking into account that it is generally considered that cartel arrangements fixing prices produce most harm to the affected markets, final consumers of the products or services concerned and consequently, to the economy as a whole. This is why the fight against cartels, proper sanctioning of the participants of the cartel and cross border cooperation are in focus of most competition authorities. Thus, the CCA like many other national competition authorities in the EU has been empowered to carry out surprise inspections of business and other premises, land and means of transport, to seal any business premises or records and to seize objects and documents which are subject to a surprise inspection. In 2013 the CCA conducted its first dawn raid. However, no evidence on the existence of an allegedly prohibited horizontal agreement between competitors (cartel) was found.

Despite the above mentioned powers the work of the CCA is still restricted due to **lack of computer forensics equipment and limited budgetary resources for the purchase of such equipment**. Computer forensics equipment is an indispensable tool in the disclosure of cartels, together with the implementation of the leniency programme that is provided for under the Competition Act. In other words, the CCA may grant immunity from fine to a “whistle-blower” – a cartel member who first comes forward and informs the CCA on the existence of a cartel and supplies evidence which will enable the CCA to initiate the proceeding in connection with the alleged cartel, or to the first cartel member who submits the relevant evidence on the existence of a cartel, where the CCA had previously initiated the proceedings.

Although the immunity programme was introduced as early as on 1 October 2010 it has still not been implemented in practice, which matches the experience of some other Member States. In this sense, the CCA will consider to promote actively and present the immunity programme in cartel cases.

Finally, the activities of the CCA in the area of competition advocacy were intensive also in 2013. **Competition advocacy and strengthening of competition culture** involves raising awareness about the effects of competition among central and local administration authorities, executive, legislative and judicial authorities, but also the general public, about the benefits competition brings for the consumers and the economy. Noteworthy to mention here is the liberalization of the provision of taxi services in Zagreb, which was the result of the CCA endeavours in competition advocacy.

Among 144 opinions and statements issued by the CCA in this area the following may be outlined here: the activities of the CCA within its powers as the **regulatory impact assessment authority for competition issues**, such as the opinion on the Proposed Draft Act on Strategic Investment Projects of the Republic of Croatia, the cooperation with the Croatian Regulatory Authority for Network Industries (HAKOM) in the form of 5 expert opinions regarding the requests of HAKOM containing its analyses of the relevant markets subject to ex ante regulation in the electronic communications sector and 4 expert opinions on alternative postal and courier services applications HAKOM receives and asks previous opinion of the competition authority. The most frequent sectors which asked for the CCA opinion or statement were in 2013 the telecommunications and postal sector, the provision of utility services, joint bidding in public procurement, health care sector, financing of research organizations etc.

Usually, the effectiveness and efficiency of competition authorities is measured by the number of court decisions upholding the decisions of the competition authority. In this sense, the **positive trend in the results achieved by the CCA** continued also in 2013 when the competent administrative courts (administrative courts of territorial jurisdiction and the High Administrative Court of the Republic of Croatia took 21 decisions, where 19 thereof rejected the claim of the claimant, whereas 2 decisions ruled on termination of the

proceeding. In other words, no claim was confirmed, 19 claims were rejected and two were withdrawn.

In the area of State aid, the annual report for 2013 indicates a **negative trend in the structure of aid granted**, i.e. the figures show that more State aid was granted in the form of individual aid to individual undertakings than in the form of aid schemes for horizontal objectives. On one hand, this trend once again reflects the selective nature of State aid in Croatia, on the other hand, the positive effects of aid on economic growth and competitiveness. The part of the annual report dealing with State aid also offers a number of examples from the case practice of the CCA, such as restructuring aid for *Croatia Airlines*, aid to innovation in the shipbuilding sector, aid for culture, as well as opinions issued by CCA after the EU accession on 1 July 2013 within the meaning of its new advisory role, e.g. CCA opinion on the *financing of the Croatian News Agency*, and its comment on the activities of the *public research organizations* under market conditions.

Finally, the activities relating to **international cooperation** of the CCA are also a part of the commitments undertaken by the Republic of Croatia as a Member State. In practice, this means close cooperation with the European Commission in Brussels, the implementing authority for competition policy in the internal market, but also with the ECN national competition authorities. On the other hand, the CCA cooperates with international competition organizations and takes part in competition policy fora both at bilateral and multilateral level, OECD, ICN etc. Bilateral cooperation is established also with competition authorities in other countries.

In line with Article 26 paragraph 9 of the Competition Act the **CCA is financed from the State budget**. The CCA has no other operational or financial revenue of its own. Administrative fees and fines determined and imposed by the CCA are within the meaning of Article 26 paragraph 10 of the Competition Act contributed to the budget of the Republic of Croatia.

The budget of the CCA amounted to 13.1 million Kuna in 2013. The planned funds for the regular operational activities falling under the scope of the CCA in the State budget for 2013 – funds from source 1 general revenues and receipts – amounted to 13,055.600 Kuna. Besides that, the planned funds from source 5 support – which are EU funds for the IPA 2007 final payment – amounted to 79,474 Kuna.

The total executed budget in 2013 amounted to 12,816,783.67 Kuna, from source 1 general revenues for the regular activities of the CCA the sum of 12,738,116.30 Kuna, whereas from source 5 EU funds 78,667.37 Kuna were executed.

In comparison with 2012 the total execution of expenditures of the CCA for 2013 indicates a decrease in total expenditures by 5,815,073.21 Kuna or 31.21 per cent.

This decrease was the result of the decrease in the expenditures for EU projects (source 5) which in comparison with 2012 fell by 4,999,166.35 Kuna or 98.45 per cent.

The expenditures for employees made 74.97 per cent of the total expenditures. **In 2013 there were 51 employed persons in the CCA.** In 2013 there were no new employments; on the contrary, the number of employees fell by 4 percent compared with 53 employees working in the CCA in 2012. Compared with 2011, when there were 57 employed in the CCA, the decline in 2013 was 11 per cent.

In accordance with the findings of the Ministry of Finance, Directorate for Financial Management, Internal Audit and Supervision in November 2013 no irregularities were reported in respect of the salaries expenditures of the CCA.

In 2013 out of 51 employees 41 were included in the enforcement of competition rules, 10 employees performed other activities closely related to the core business and the functioning of the CCA. In the report period 13 employees had a postgraduate degree, 18 out of 20 lawyers had a bar exam.

Transparency is the priority of the work of the CCA. In line with the Competition Act, the decisions are published in the Official Gazette, whereas all the decisions may be found on its website. What is more, press releases and press conferences accompany most decisions. The CCA also publishes an e-Bulletin that facilitates the understanding of the decisions made by the CCA as well as the general interest in this discipline of law.

In conclusion, the priorities of the work of the CCA in the forthcoming period are laid down in its strategy statement for 2014 – 2016. Promoting the benefits effective competition produces for undertakings and consumers will stay in the focus of the CCA, concentrating on most harmful practices for both the consumers and other competitors, that is, hard core restrictions of competition and particularly cartels.