“CroCompete Conference - New Competition Horizons for Croatia”

Sheraton Hotel, Zagreb, Croatia

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10:30-11:15  Panel I:

“The fight against Cartels - Experience in the Practice of Setting Fines, Operating Leniency Programmes, and, doing Dawn Raids”

Co-moderator:

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Introduction

Good morning ladies and gentlemen and welcome to the first panel session of the day entitled “The Fight against Cartels - Experience in the Practice of Setting Fines, Operating Leniency Programmes, and Doing Dawn Raids.”

My name is André Bywater and I am the key legal expert working on the EU-funded CroCompete Project “Implementing Croatian Competition & State Aid Policies” that has organised today’s conference and I’m co-moderating this panel. I’m a UK-qualified lawyer and I’m based in Brussels.
My co-moderator is Professor Siniša Petrović from the Faculty of Law of the University of Zagreb. Our four panellists are each from different EU countries:

- Mr. Bogdan Chiriţoiu from Romania;
- Mr. József Sarai from Hungary;
- Mr. Gianluca Sepe from Italy; and,
- Mrs. Deevi Asbaum from Estonia.

Our panel is going to share with you our experience and thoughts about the three related topics of imposing fines, leniency for fines, and, dawn raids, in order to give you in the audience some ideas as to what you can expect in Croatia concerning these issues.

The New Act And Forthcoming Secondary Legislation

As you will now be well aware, the new Croatian Competition Act is about to enter into force which will give the Croatian Competition Agency the new significant power of being able to directly impose fines, and, to operate a leniency programme. In addition, the new Act has further defined the special dawn raids investigative tool.

The New Act will also be followed in time by secondary legislation, i.e by-laws, which will go into greater detail about fines and leniency.

Fines - Introduction

The possibility of being fined under Croatian competition law already existed, and, indeed,
the issue in general of imposing fines for anti-competitive behaviour is in itself nothing new - even the Romans had a kind of competition law under which fines could be imposed!

So the question you may be asking is: Why pay such attention to fines?

To answer this question, let me just start by giving you a few statistics concerning some cartels under EU competition law of this year:

- € 175,647,000 fine imposed by the European Commission on 13 animal feed companies for a 30-year price-fixing and market-sharing cartel;

- € 518 million fine imposed by the European Commission on 17 steel companies for a 20-year price-fixing and market-sharing cartel;

- € 622 million fine imposed by the European Commission on 17 bathroom equipment companies for a price fixing cartel.

These are big numbers that hit business profits and demonstrate that competition authorities are serious about cartel enforcement action - historically the level of cartel fines have increased and it can be expected that such increases will continue.

Such enforcement is there to ensure that business is done fairly in a market economy.

No doubt the Croatian Competition Agency will also be taking similar serious action when it
imposes fines, so, Croatian businesses please take note!

**Fines - Methodology**

The other major point to understand about the issue of fines is that there is an important process involved, i.e. fines are not imposed in a random way.

Instead, the process is governed by its own procedure and a particular methodology is applied.

Typically there is a two-stage process: first, the basic amount of the fine is set, according to certain criteria; second, this amount is adjusted to either increase or decrease this amount.

A range of factors are applied in this process, including the seriousness and length of time of the anti-competitive activity, the degree of cooperation of a company with the investigation, whether the company has previously been fined for being in a cartel etc.

It is important for businesses to understand that the imposition of fines is not a one-way process. Typically, certain data about the companies’ businesses must be obtained (under EU competition law this is the value of sales), and, companies have procedural rights so that they can defend their position, notably as regards presenting mitigating evidence to try and obtain a lower fine.

What must also be emphasised is that fines methodology is not a science - it is more of an
art! The methodology is a framework that is applied on a case-by-case basis.

I also wish to emphasise that careful attention must be paid to the significant amount of detail that is involved in the fine-setting process.

**Fines - Leniency**

A so-called “leniency programme” is a way for a competition authority to reward companies which, in cartel cases, cooperate with the competition authority in the detection of and investigation into cartels.

Under such a leniency programme, these companies are guaranteed either immunity or reductions in penalties (mainly fines).

Generally-speaking, leniency programmes have been a very successful way for competition authorities to prosecute cartels - so much so, that in many jurisdictions most cartel investigations are started because of leniency applications.

Leniency programmes also operate under specific procedures.

Typically, in order to obtain total immunity under a leniency policy, a company which has participated in a cartel must be the first one to inform a competition authority of an undetected cartel by providing sufficient information to allow a competition authority to launch a dawn raid at the premises of the companies allegedly involved in the cartel.
Companies which do not qualify for immunity may benefit from a reduction of fines if they provide evidence that represents significant added value to that already in the competition authority’s possession, and, have terminated their participation in the cartel.

In all cases, the company must also fully cooperate with a competition authority throughout its procedure, provide it with all evidence in the company’s possession, and, put an end to the infringement immediately - this is something I wish to emphasise in particular to Croatian businesses.

A leniency programme may also have a so-called “marker system”. Under this system, a company wishing to make an application for immunity can apply for a marker to protect its place in a queue for a given period of time, and, which allows the company time to gather the necessary information and evidence in order to be able to have sufficient evidence to apply for immunity.

So again it can be seen that leniency is a process that will have to be carefully managed, both by the Croatian Competition Agency and the Croatian companies that submit to it.

**Dawn Raids**

Finally, we come to so-called “dawn raids”. Dawn raids are a major instrument in the fight against cartels, and often make news headlines - whilst I was preparing this presentation, news about a dawn raid (in the UK) featured on the front page of the Financial Times!
A dawn raid is a surprise inspection by a competition authority (usually assisted by the police) where the authority enters the premises of a business, and also private homes of representatives of a business where necessary.

Under such an inspection, a competition authority has significant powers: company documents can be examined, including those held on computers, and such documents can be taken away; business premises can be sealed; and, questions may be asked of company personnel for explanations about facts or documents relating to the subject-matter of the inspection.

Dawn raids are a very useful means for a competition authority to get the evidence that they are looking for - they can also be intense, intrusive, and stressful experiences!

Concluding Remarks

The fight against cartels is serious business.

And things don’t necessarily stop after an investigation by a competition authority. A finding by a competition authority also leaves a company open to the risk of facing a court case brought by an injured party for (financial) damages - but that’s the subject of a whole conference in itself!

That’s all I have to say at this stage and so I now turn to my co-moderator and invite him to address you.

André Bywater, 22 September 2010