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Competition Council,
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October 2021
President of the Competition Council, Croatian Competition Agency

January 2019-October 2021
Member of the Competition Council, Croatian Competition Agency

2007-2021
Deputy Head and Senior Adviser in International and European Cooperation Department, Croatian Competition Agency

2004-2007
Case handler and Head of Department-market for services, Croatian Competition Agency

In 2021 you were appointed as president of the Competition Council by the Croatian Parliament, after serving as a Competition Council member for several years. Prior to that, you worked at the Croatian Competition Agency (CCA) on international cooperation and EU matters, in particular during Croatia's pre-accession phase, establishing important contacts with the European Commission (EC) and within the European Competition Network. A lawyer by training, you did your LLM at the University of Sussex in EU law and a PhD at the University of Zagreb, focusing on the notion of leniency in cartel enforcement. How would you describe your career path, and what challenges did you encounter? Do you find it satisfying to work in this field, and why? What is your experience so far in leading the CCA?

My career path, as you correctly put it, has always been international and European-oriented. I started my professional career in the Ministry for European Integration, where I worked as a legal adviser on the level of conformity of Croatian legislation with different chapters of the EU acquis. This professional experience and skills gained helped me later when I joined the Croatian Competition Agency (CCA), especially during my work in the International and European Cooperation Department, where I had contacts with the EC and other EU national competition authorities (NCAs) on a daily basis. At the CCA, firstly, I worked as a case handler for several years and as a head of the Market for Services Department. During that period, I had the chance to work on all types of cases—mergers, abuse of a dominant position, prohibited agreements and advocacy. I find this very important and useful because even though you can specialize later in one part of competition law, in this field gives you a solid basis. This experience helps me when I adopt decisions—previously as a member of the Council and now as the president of the Council.

The only challenge I encountered was to find an area of specialization, which happened when I started working at the CCA almost nineteen years ago. Once I started doing competition law, I could not leave it; I still find it fascinating, and in my opinion, it is one of the most interesting fields of law. The main reason for that is the fact that competition law is never static, never boring, every case is specific, it changes and constantly develops mainly through the extensive case law of the European courts and decisions of national competition authorities. Now, with digital markets, another interesting area of competition law has started, which will surely bring new challenges and developments to competition law. Besides that, it is rewarding to work in a field that brings benefits to all of us as consumers as well as businesses, markets and the whole economy.

So far, so good. Every managerial role has its challenges, and the biggest I am facing as a leader is to ensure sufficient resources for the effective work of the

CCA, which is not easy. The CCA has good experts, but more staff is needed. Another challenge is to remain engaged as an expert and to continue promoting competition and spreading knowledge, which is very important for the culture of compliance with competition rules, and at the same time, to manage the work of the CCA on a daily basis. In addition, international and European recognition of the CCA, especially being a small competition authority, is also very important, so in this respect, the role of the president has to include this international aspect as well. At the EU level, this means regular cooperation and exchange of best practices with heads of other EU competition authorities and of the EC. My advantage is that I have professional knowledge of competition law and that I am familiar with the functioning of the CCA and with its employees.

"Competition law is never static; every case is specific and it changes constantly. It is rewarding to work in the field which brings benefits to all of us as consumers along with benefits to business and the whole economy."

I find three pillars of my mandate crucial for the work of the CCA:

– Effective enforcement-solving cases and imposing fines with preventive and deterrence effect for breach of competition rules and rules on unfair trade practices in the food supply chain. For effective enforcement of competition law, the CCA but also the parties should make use of instruments such as commitments, leniency and settlements.

– Promoting competition and advocacy by the use of legal opinions, sector inquiries, expert articles, modern communication or education and organization of events This is very important because it is another part of how enforcement is interlinked: the better the competition culture in society, the more effective competition, and ideally, the fewer infringements of competition law.

– Open cooperation with all stakeholders domestically, including other regulators, government, parliament, academia (universities), judiciary and undertakings within legal boundaries, and internationally with competition authorities from other countries and international organizations or networks.

The CCA has the dual mandate to enforce both competition rules and the rules on unfair trade practices (UTPs), although the competition mandate has always been considered its core competency. After all, this is why the AZTN was established in 1995, to act against the restraints of competition. However, during the last couple of years, a disproportionately larger number of decisions in the field of UTPs were adopted by the CCA. How do you explain this disbalance? Is this something that needs addressing?

No. I think this is just an impression in the public due to the fact that we imposed several relatively high sanctions for the breach of the Act on the prohibition of unfair trading practices (hereinafter the "UTP Act") in the business-to-business food supply chain, and the media reported more about those decisions. I suppose this is interesting to the public because it is a completely new area (unlike competition) that regulates fair practices between buyers and suppliers in the food supply chain. Moreover, there is a large number of UTPs, and one of the specificities is that the law has introduced a mandatory form and content for the agreement between buyers and suppliers. In other words, if there is one obligatory segment missing from the contract, this is UTP proven for which the fines can be imposed. So, in that respect, it is more straightforward and easier to prove than, for instance, a cartel or abuse of a dominant position in competition law. In the beginning, when the UTP Act entered into force, there were a lot of omissions in the existing contracts, which were not aligned with the law. Consequently, there were more decisions establishing the breach of the UTP Act. Now, the situation changed with more contracts in compliance with the provisions of the UTP Act. We are very happy with the results of the implementation of the UTP Act, which according to the comments from practice, is efficient and brought many benefits in relations between buyers and suppliers in the food supply chain, improved legal certainty by prescribing the mandatory content and the form of the contracts, increased compliance with contractual obligations, introduced financial discipline in relation to the terms of payment, increased liquidity in the agriculture and food sector, just to mention a few. In relation to competition cases, if you look at our annual reports, for instance the report for 2021, you can see that we still have more cases opened in competition than in UTPs. Concretely, on 31 December 2021, there were 40 pending administrative cases, 28 in the area of competition, 12 in the area of UTPs, and 33 cases were resolved in competition, whereas 10 were solved in UTPs.

As many firms in Croatia have seemingly used the transition from the kuna to the euro to raise their prices, and amidst the ever-rising inflation, the Croatian Ministry of Economy is setting up a "public comparative prices" register for essential consumer products, such as rice, flour and oil, to ensure "fair" prices. On the other hand, we heard from a retailers' trade association claiming that it was necessary to raise prices, mainly due to inflationary pressures. In this context, how do you see the role of the CCA? What is the ambit for CCA'ss engagement in these challenging times?

The only role the CCA, as competition authority and the regulator, can have is to vigorously continue enforcing competition law, ensuring the conditions for effective competition for undertakings, and punishing the ones that do not respect those rules and engage in anti-competitive practices. The role of the competition authority is not, and should not be, to regulate prices or to state which price should be considered "fair." Its role is to react to suspicious changes in prices if they prove to be the result of a breach of competition rules, for example, as a result of

– prohibited agreements from undertakings that are competitors, such as agreements on prices or division of the market;

– practices such as resale price maintenance in vertical agreements (the restriction of the buyer's ability to determine its sale price, especially if they amount to a fixed or minimum sale price as a result of pressure from, or incentive offered by, any of the parties);

– abuses of a dominant position.

When talking about prices and prohibited agreements, one has to differentiate between indicia on a potential agreement, which needs to be established by the CCA to open the proceeding from the general perception of the public about higher prices, and an alleged agreement between competitors, often present now in the context of inflation and the introduction of the euro. In practice, it is common that one undertaking raises prices followed by the others without mutual agreement. This type of parallelism in conduct is not prohibited in competition, unlike the mutual agreement between competitors on the rise in prices, but this has to be proven before the CCA.

Another important role that the CCA can play to help in this regard is advocacy, including sector inquiries bur also statements that competition authorities can publish on their web site or send directly to undertakings offering explanation— on prohibited agreement on prices between competitors and warning that any announcement of competitors or associations about planned prices on behalf of their members can lead to the opening of proceeding to establish a prohibited agreement.

In your opinion, what are the most pressing issues related to the enforcement of competition rules in Croatia at the moment? Are there any strategic priorities as defined by the CCA?

The focus of the work of the CCA and its priorities remain on the detection and sanction of the most serious infringements of competition law, primarily cartels that cause financial damage to their customers, the market and society as a whole. Thus, this remains one of the priorities, with special emphasis on detecting more bid-rigging cartels, which are the most harmful form of prohibited horizontal agreements. In that respect, the CCA gained access to the electronic registry of public procurement, and it started with the development of a special innovative digital tool that could help detect more bid-rigging cases. In addition, we have several ongoing investigations of some high-profile cartel and abuse of a dominant position cases, which should be completed in the course of this year. Merger control also remains one of the priorities. Furthermore, there is a need to promote instruments like leniency and settlements more strongly. The CCA has a rather small number of leniency applications, and the settlement was just introduced with the latest amendments of the Competition Act in 2021.

"For effective enforcement it is important to follow new developments in competition law but it is also crucial to combine enforcement with competition advocacy and cooperation with different stakeholders. The authority can only do that successfully with sufficient human and financial resources"

One of the priorities in the upcoming period will be to continue following digital markets. So far, we have made two sector inquiries into digital platforms, and results showed that some of those might lead to enforcement action. In that respect, the implementation of the Digital Markets Act (DMA) will be of particular interest where we see the role of our competition authority as cooperation and support to the activities of the EC when implementing the DMA. We are in the process of defining the competent body at the national level, but the CCA already participates in the advisory committee for the DMA.

Another important aspect of our work will be further advocacy activities and maintaining the transparency with modern communication tools. Legal opinions on the conformity of laws with competition law and market studies are crucial tools to further promote competition. The CCA prepares and publishes three to four market studies every year, such as the retail groceries market (market research in food, beverages, toiletries and household supplies), the insurance market, the press publishing market, and the digital platforms for food delivery market. And this year, the CCA is conducting a market inquiry into the Croatian fuel market. Other priorities include organizing conferences and trainings, providing education in competition law, and strengthening cooperation with other institutions, especially universities. From our other competence in UTPs, the priority is to implement the amended UTP Act, to fine more unfair trade practices, and to provide explanations to the addresses of the law (we already published on our website compilation of more than 200 questions and answers) and to work on further amendments to the UTP Act.

Certainly, another priority that should be mentioned is to ensure more human and financial resources for the work of the CCA.

There seems to be a marked difference between the level of enforcement intensity in antitrust cases by the CCA in the times before and around Croatia's accession to the EU, which occurred in 2013, and in the last five years or so. What are the reasons for this, and what can be done to address this issue?

I think that each period of time has its challenges and specific circumstances, which then put emphasis more on certain areas of enforcement. In the pre-accession period before 2013, the level of awareness of competition law was rather low, which resulted in much easier detection of cartels or abuses of a dominant position. Also, since you mentioned the period before EU accession, at that time, the strong emphasis was put on State aid, which is no longer under the competence of the CCA. Lots of activities were focused on accession to the EU and aligning its practice and legislation with EU competition law.

There were several large merger cases with companies no longer present in the same form in the Croatian market, there were more abuse of a dominant position cases, and now there are more prohibited agreement cases. Now, the situation has changed in terms of higher recognition and understanding of competition law, more specialized lawyers in competition law and the use of new sophisticated digital methods to conceal prohibited behavior. Thus, it is more difficult to discover and prove infringements, if not almost impossible, without surprise inspections or leniency. So, all this requires a more complex investigation than before. Therefore, we can conclude that the number of solved cases is still rather high if you look at our annual reports with a small staff number.

"The potential of OECD membership will bring another important and useful global component in the work of the CCA and in the further development of best practices in applying competition rules in Croatia."

Despite the fact that Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) can be applied by national competition authorities, as outlined in Regulation 1/2003, the number of such decisions adopted by the CCA is very small. Most decisions were adopted under national competition rules. This phenomenon has been reported in several countries in Central and Eastern Europe. Arguably, a direct consequence of not using a double legal basis (national law + Arts. 101 and/or 102 TFEU) is an absence of preliminary references to the Court of Justice of the European Union (CJEU) made by the review courts in Croatia. Do you see any need to address this issue?

Actually, the CCA does open cases on a dual legal basis. In the last ten years, we opened two cases on the basis of Article 101 TFEU (one is completed, and the other one is still pending) and on the basis of Article 102 TFEU, there are eight opened cases, and six of them are finished. The number may not seem very high, but I think it is reasonable for a small EU competition authority.

As a regulator, the CCA cannot address the issue of what the courts should do or influence the review courts in any way, but it would be very useful for the future practice of Croatian courts in line with the EU competition acquis if they could more often ask for a preliminary ruling from the CJEU.

In January 2022, the OECD Council decided to open accession discussions with Croatia, and in June 2022, a Roadmap for the OECD Accession Process was adopted. What will the potential membership of Croatia in the OECD mean for the CCA and the enforcement of competition rules in Croatia?

First, it should be stressed that the CCA has long-established cooperation with the OECD. Primarily via OECD/GVH Regional Centre for Competition in Budapest (hereinafter the "RCC Centre"), where our employees regularly participate in seminars organized by the RCC for almost twenty years. Furthermore, the CCA has been included in the work of the OECD Competition Committee since 2016 with the participant's status. Hence, the representatives of the CCA (both at the Council level and expert team level) participate in the meetings of working groups of the OECD Competition Committee, often with written contributions. We also regularly attend the OECD Global Competition Forum taking place at the end of each year. In the regular work of the CCA in case handling, OECD papers and work documents are often used as a useful reference. Finally, the CCA is directly involved in the negotiations of Croatia for accession to the OECD, and I am personally a member of the negotiating team with our head of International and European Cooperation Department as a deputy member. The activities in the negotiations, primarily with the OECD Competition Committee, are very intense for the CCA. We have already hosted the Committee's first mission within our competition authority and organized numerous meetings with various stakeholders, and we have prepared answers to a comprehensive questionnaire including all aspects of our work. The potential of OECD membership will bring another useful global component in the work of the CCA and in the development of best practices in competition rules in Croatia.

The ECN+ Directive allows strategic prioritization in the enforcement of Articles 101 and 102 TFEU. In other words, it gives the power to the NCAs to reject complaints on the grounds that they are not a priority. The Croatian Competition Act has been amended to this effect. Do you think that this change might help make enforcement more effective and more focused? Have there been any instances of rejecting complaints by invoking prioritization so far?

The Competition Act provides for the mentioned provision from the ECN+ Directive about rejecting the complaint based on the lack of priorities, stating that the CCA is empowered to set the priorities in its work also where it receives the initiative for the initiation of an *ex officio* proceeding within the meaning of the Competition Act and Articles 101 and/or 102 TFEU. So far, there has been no rejection of complaints based on this provision, but it is in the pipeline to develop criteria for the rejection of complaints based on the lack of priorities. For the purpose of legal certainty for those who would send the initiative, it is important to have such criteria and to give a solid explanation of why something is not the priority at the moment—especially if we consider General Administrative Procedure Law provisions, which we also apply in our proceeding and which require a reply from the public administration bodies to any request. I agree that this is a useful instrument that may help us in our future work to focus on the most concrete and serious cases, especially taking into account our scarce resources.

Unlike the rest of the EU countries, except perhaps Sweden, Croatia has a one-tier system of judicial review in competition cases. The CCA's decision may be exposed to challenges before the High Administrative Court of the Republic of Croatia. Only under certain very limited conditions may its judgment be challenged

before the Supreme Court of the Republic of Croatia. On the other hand, applicants dissatisfied with the High Administrative Court judgments in competition matters may launch a constitutional complaint before the Constitutional Court of the Republic of Croatia. Both the lack of a second instance of judicial review and the involvement of the Constitutional Court as an additional instance of control, arguably contrary to its role as envisaged by the Constitution, have been criticized. Do you think the system of judicial review in Croatia needs to be changed, and why?

There is a good reason behind one-instance judicial review for competition cases. It was introduced primarily to ensure urgency, efficiency and confidentiality of proceedings in which we request an order from the High Administrative Court to conduct surprise inspections. In two-level instance, first with different competent administrative courts and then with the High Administrative Court, there would be a danger to slower the process and revealing information about planned surprise inspection, jeopardizing the effective use of this important investigative tool. In terms of economic efficiency, the advantage of having one court instance is that one court with full jurisdiction, which can also hold oral hearings, decides both the material and procedural aspects of our decisions and the level of the fine imposed. On the other side, the disadvantage is that there is no further regular legal remedy, so even though we respect all judgments of the High Administrative Court, if the CCA is not satisfied with the judgment of the High Administrative Court, then we can only turn to extraordinary legal remedies decided by the Supreme Court. If the parties are not satisfied with the judgment of the High Administrative Court, they can only use extraordinary legal remedy with the Supreme Court, and this is probably the reason why some of the parties turned to the Constitutional Court. The three main reasons and legal basis for submitting a constitutional claim are: (i) the decision of the public institution is arbitrary and not based on sufficient evidence; (ii) the parties' right to a fair hearing was breached; or (iii) a breach of legality of individual decisions of public administration bodies and their judicial control. Since those legal grounds are rather broad and can be practically invoked in every case, the parties are using them although those decisions of the Constitutional Court are not always against the decisions of the CCA. There were some examples in earlier practice when they also confirmed the constitutionality and legality of our decisions. In conclusion, the system of current judicial review as such functions in practice, so there might not be the need to change it completely, but what would be useful is to have more review court judges specialized in competition law.

"One instance judicial review system has its advantages in terms of efficiency, urgency and confidentiality of the proceedings and it functions well in practice. There is no need to change it substantially but what is needed are more judges specialized in competition law."

When it comes to competition cases, arguably the stance of the Constitutional Court of the Republic of Croatia changed from EU-friendly and deferential to CCA's decisions in the period before Croatia's EU accession to non-deferential and overlooking EU law standards in the post-accession period, at least when it comes to several high-profile cartel cases. This potentially caused, at least to my eye, serious long-term damage to the effectiveness of cartel enforcement in the country. Interestingly, the intensity of judicial challenges by the parties exposed to infringement decisions, as well as the rate of success in challenging the CCA's decisions, grew exponentially in the period subsequent to granting the CCAthe power to impose fines directly. How will the CCAproceed as regards cartel enforcement in the future? What can be done to ensure the observance of CJEU standards, in particular as regards the standard of proof for cartel behaviour?

We can only proceed in the same way as by now, using all our investigative tools to detect cartels (request for information, leniency, surprise inspections, interviews, etc.), proving the cartels with solid evidence, and preparing clear and well-argued decisions with appropriate fines. However, we have to respect the decisions of the review courts, primarily the High Administrative Court, but also the Constitutional Court (although it is not strictly speaking the review court). The Supreme Court also played a crucial role in a cartel case with the Croatian Orthodontic Society (COS), where the High Administrative Court overturned our decision establishing a cartel in line with EU case law standards. In this case, the CCA found that, by the adoption of the "Minimum prices for orthodontists services," the COS concluded a prohibited agreement. However, the High Administrative Court overturned this decision, and it was the position of the CCA that, by this judgment, the High Administrative Court challenged in its ruling the very concept of a cartel as defined under the Competition Act and by the EU acquis in the area of competition. In its ruling, the Supreme Court stated that the infringement decision of the CCA properly found that by the adoption and publishing of the document "Minimum prices for orthodontists services," the COS concluded a prohibited agreement under Article 8(1) of the Competition Act. The Supreme Court also repeated the very statements of the CCA during the administrative proceeding that the law does not empower any association of undertakings to fix the prices of the products or services of its members, and that any fixing of minimum or fixed prices constitutes an infringement of competition rules. In addition, in its ruling, the Supreme Court supported the finding of the CCA that such agreements are prohibited by object where restrictions of competition by object are those that by their very nature have the potential of restricting competition and have such a high potential of negative effects on competition that it is unnecessary to demonstrate any actual effects on the market. This is a good example of how even the highest court can play a crucial role in maintaining the case law in line with the main principles of the EU competition acquis. ■

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