Class: UP/I 034-03/12-01/023
Reg.no: 580-10/70-2019-157
Zagreb, 6 November 2019

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

Decision on non-infringement of competition rules

Case summary:

In the infringement proceeding that the Croatian Competition Agency (CCA) carried out ex officio against the undertaking Hrvatski Telekom d.d., from Zagreb (HT) regarding the possible distortion of competition in the form of abuse of a dominant position in the market by the undertaking concerned the CCA found that HT did not abuse its dominant position in the distribution of premium football content in the territory of the Republic of Croatia in the period from 7 November 2011 to 30 June 2018 within the meaning of Article 13 of the Competition Act given that no evidence was found on actual or likely exclusionary behaviour by the undertaking HT relevant to its competitors in the downstream market – the provision of pay TV services in the territory of the Republic of Croatia.

Further, in line with Article 2a and Article 74 of the Competition Act regulating the application of the 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.

The principal cause for the initiation of the infringement proceeding against HT was the fact that Arena Sport pay TV channels and premium sport content such as live broadcasting of UEFA Champions League, UEFA Europa League and First Croatian Football League football matches were available only by the HT pay TV services provider MAXtv, which was defined in the contracts concluded on 24 October 2012 between the undertakings HT, HD-WIN d.o.o. from Beograd, Serbia and its connected company HD-WIN Arena sport d.o.o. from Zagreb. It was essential to establish in the course of the proceeding whether such practices of HT lead to restriction of competition between the competitors in the market concerned and to a limited consumer choice, in other words, whether it constituted exclusionary abuse in line with Article 13 of the Competition Act.

Following the investigation in which the CCA thoroughly examined all the evidence and carried out the necessary market analyses and reviewed the additional comments, data and documentation requested and received from HT, other operators and 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, it has been established that in the downstream market – the provision of pay TV

services (transmission of TV channels) in the territory of the Republic of Croatia HT had been facing effective competition, which failed to cumulatively satisfy one of the criteria for the establishment of abuse of a dominant position by refusal to deal within the meaning of paragraph 81 of 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, which in this concrete case rules out the application of Article 13 of the Competition Act.

Namely, the market share analysis in the provision of pay TV services market with respect to both the number of subscribers and realized turnover, the entries and the continuous grow of this market in general, does not lead to a rational conclusion that HT had been engaged in exclusionary practices. On the contrary, there had been new operators entering this relevant market in the period concerned.

The analysis indicated that despite the fact that HT owned the content concerned, it recorded a fall in the market share (both relative to the number of subscribers and the realized turnover) in the period concerned. In other words, the content at issue did not raise the market share of HT and did not stop the drop of its market share. The acquisition of the sport content concerned did not have any impact on other undertakings in the sense of market foreclosure based on the fact that the market concerned was entered by four new entrants in the period concerned.

In addition, in its Decision on market analysis of retail broadband access of 2015 the specific regulator HAKOM stated that the provision of pay TV services is not subject to *ex ante* regulation and that this relevant market in the provision of pay TV service, linked to the relevant market in the provision of access services, would aspire to effective competition without regulation. HAKOM did not get involved with the analysis of the content offered by the operators.

Taking everything into consideration it was established that HT had been facing effective competition in the downstream pay TV market.

It must be noted that this proceeding was carried out regarding the practices of HT in the distribution of premium football content in the context in which HT is not the broadcaster within the meaning of the Electronic Media Act, HT acquired the rights for the premium football content concerned but is at the same time active in the provision of pay TV services. At the same time, the proceeding did not include the practices of HD-WIN in the TV channels distribution, which excluded HD-WIN from the status of the party to the proceeding.

Furthermore, in November 2018 HT acquired a 100 per cent share capital in the company HP Produkcija d.o.o. and thereby took over the broadcasting business EVO TV. HAKOM declared this concentration conditionally compatible and imposed remedies to eliminate anticompetitive effects of the concentration concerned.

The above-mentioned circumstances in this case, including the changes in the market regarding the acquisition of transmission rights for the UEFA Champions League football matches in the forthcoming three-year-period place the matter under the close scrutiny of the

CCA. The CCA will continue to trace the developments in the provision of pay TV services market, the upstream markets, the content distribution market and the TV channels distribution market where TV broadcasters are active.

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 everything into account, after establishing that in this concrete case HT did not distort competition within the meaning of Article 13 of the Competition Act the CCA closed the case without taking a positive decision on the merits and decided to terminate the proceeding against HT in the part that was initiated within the meaning of Article 102 TFEU.