

Class: UP/I 034-03/17-01/010

Reg.no. 580-10/76-2021-90

Zagreb, 30 December 2021

Case: CCA vs. Hrvatski Telekom d.d., Zagreb

- **Alleged abuse of dominance**
- **Decision on termination of the proceeding**

Case summary:

The Croatian Competition Agency (CCA) terminated the proceeding initiated against the undertaking Hrvatski telekom d.d. (HT) and concluded that any further action within the meaning of Article 13 of the Competition Act and Article 102 of the Treaty on the functioning of the EU (TFEU) would not be purposeful in the sense of procedural efficiency.

Following the receipt of the complaint made by the undertaking Magic Net d.o.o. from Ludbreg alleging abuse of a dominant position by the undertaking HT in the form of “dumping” and margin squeeze in the provision of telecommunication services, the CCA opened the proceeding against HT on its own initiative following the circumstantial evidence that HT has been abusing its dominant position in the pay-tv market in the territory of the Republic of Croatia by offering expanded TV packages (Prošireni TV, MAX Arena, MAX Sport Plus and HBO Premium packages) under long-term discount prices for term contract commitments, offering the highest discount for the 24-month contract. This discount for TV deals was in effect from 14 April 2017 until the end of 2019 – the duration that was taken relevant in the CCA analysis.

It should be noted first that any distortion of competition by abuse of dominance must fulfil two cumulative conditions: the undertaking must actually hold the dominant position in the relevant market in the sense of Article 12 of the Competition Act, and second, it must be shown that it abuses its dominant position in the sense of Article 13 of the Competition Act and Article 102 TFEU.

In the course of the proceeding, it has been found that HT indisputably has the highest market share and holds a dominant position in the pay tv market in the Croatian market in the relevant period, even outside the HT Group.

Taking into account the EU law and practice, particularly the relevant rulings of the Court of Justice of the European Union and the General Court, specifically the rulings in *Deutsche Post* and *Post Denmark*, the CCA investigated whether predatory pricing has been applied by the undertaking concerned. Specifically, the CCA used the long run average incremental cost (LRAIC) as a cost measure in gaining a more realistic estimation of the long run cost necessary for the undertaking to enter the market and stay on it. The analysis particularly involved the

fact that in the network industries, such as the provision of telecom services, fixed costs are high, so as not to undervalue the costs of the undertaking holding a dominant position.

By comparison of the long run average incremental cost for the provision of the base TV pack and the add-ons (bundle LRAIC cost) with the discount prices of the same services bundled with the base pack (MAXtv IPTV alone), the CCA found that the prices of the bundle packages covered entirely (in the case of MAX Arena package and Prošireni package) or 89 % to 90 % (in the case of HBO Premium Package and MAX Sport Plus Package) the long run average incremental cost for the provision of these services in the time period from 2017 – 2019.

The mere fact that the price is defined under the long run average incremental cost cannot be used as evidence of predatory pricing. Unless evidence can be furnished that the price is determined as part of a plan for eliminating as efficient or more efficient competitor in the market, the price below the LRAIC cost cannot be regarded as predatory pricing.

In addition, given the fact that the marginal cost in the analysis of HBO Premium and MAX Sport Plus packages were slightly below the comparable relevant values, the CCA adequately applied the criteria arising from the application of competition rules in the EU. Namely, to prove the predatory pricing of the services below the LRAIC there must be evidence of a strategy to exclude “as-efficient or more efficient-competitor”. In this concrete case the CCA did not find evidence of such a plan to engage in certain conduct in order to exclude a competitor by HT (such as the documents from HT clearly showing a detailed plan to engage in certain conduct in order to exclude a competitor, to prevent entry or to pre-empt the emergence of a market or evidence of concrete threats of predatory action – all described in the recent EU case law, the EC practice and the EU acquis.

Furthermore, the CCA found that HT has offered add-ons under the price available to all users, new and existing, whose contracts lapsed. Not only does the prices offered for add-ons apply to all users, but it has been in effect for a longer time period – from April 2017 until today.

As mentioned above, and as substantiated by the EU law and practice, it is less likely that an undertaking holding a dominant position would be engaged in predatory pricing where a lower price applies to all users and for a longer period of time.

Despite the fact that the circumstantial evidence collected in the preliminary market investigation sufficed to open the case against HT, in the course of the proceeding the facts of the case and the collected data could not be taken as evidence for predatory strategy by HT regarding the TV packages concerned. Consequently, in the absence of the plan to exclude the competitors no evidence of abuse of dominance by HT has been found.

Therefore, the CCA found that further steps in the proceeding concerned would not be compliant with the principle of procedural efficiency and closed the proceeding concerned.