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A new turn in Croatian antitrust law? - Croatian Competition Agency vs the Croatian Orthodontic Society

On Monday, 20 April 2015, the High Administrative Court overturned and declared the decision of the Croatian Competition Agency ("CCA") as unlawful by which the Croatian Orthodontic Society ("COS") was accused of having entered into a cartel agreement.

To recap, in its decision dated 12 June 2014 the CCA's found that the COS, by adopting the "Minimum prices for orthodontists services" pricelist, entered into a prohibited price-fixing agreement and thus violated the provisions of Article 8 of the Competition Act ("**CA**") as well as provisions of Article 101 of the Treaty on the Functioning of the European Union. The CCA imposed a symbolic administrative fine in the amount of HRK 150,000 and at the same time voided the aforementioned pricelist. The minimum pricelist for orthodontic services was established and adopted by the COS on 24 September 2010 and published and available on the COS website from the autumn of 2010, for a total of three years. During the proceeding, the COS repeatedly pointed out that the pricelist was not applied in practice.

The mentioned Article 8, paragraph 1 of the CA prohibits all agreements between two or more independent undertakings, decisions by associations of undertakings and concerted practices, which have as their object or effect the distortion of competition in the relevant market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions. If such an agreement is entered into between two undertakings operating at the same level of production or distribution, this is considered as a so-called cartel (horizontal) agreement. The CCA found that in this particular case the adoption of the pricelist in question represents an agreement on minimal prices for orthodontic services that orthodontists offer on the market, and hence, a cartel agreement, which is one of the most serious violations of competition.

The High Administrative Court in its ruling established that the pricelist in question cannot be considered a prohibited agreement because it was never applied in practice and because the COS is authorized, as a professional association within a regulated activity, to determine the cost of services for its members, and declared the decision of the CCA as unlawful.

The aforesaid reasoning of the High Administrative Court is not in accordance with the EU *acquis communautaire* which regulates the field of competition and which the CCA is obliged, pursuant to the Competition Act, to apply directly when making their decisions. Namely, when evaluating the cartel agreements, it is sufficient to establish that the object or effect of the agreement is the prevention, restriction or distortion of competition in the relevant market, and in order to establish the violation it is not necessary that the agreement was applied in practice or had other specific effects in the relevant market.

This means that such agreements are prohibited per se, as soon as the undertakings express their joint intention to behave in a certain way on the market. Furthermore, the Competition Act explicitly stipulates that its provisions apply to associations of undertakings, which undoubtedly include professional associations such as the COS. Even though such exceptions prescribed by law indeed exist for specific bodies (chambers) within the regulated activities such as dental medicine or the legal services industry, the pricelists and tariffs adopted by the chambers should be distinguished (and not identified with) from those adopted by niche professional associations. The above-mentioned ruling of the High Administrative Court essentially justifies the agreements on minimum prices of services or products within professional associations of undertakings, and calls into question the current practice of the CCA, which is largely based on perceptions of the EU *acquis communautaire*.

In this ruling the High Administrative Court laid the foundation of a very questionable practice which may lead to a completely distorted understanding of cartels in Croatia and lead to interpretations which would greatly limit the factual powers of the CCA. Although the ruling of the High Administrative Court is legally binding, the CCA issued a statement at the beginning of this week that it will submit an extraordinary legal remedy and file a request to the State Attorney's Office of the Republic of Croatia for extraordinary review of the legality of the ruling. We shall continue to follow this case with interest.

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