

## CROATIA

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# Wrong translation of Regulation 1/2003 and inappropriate provisions of the Croatian Competition Act cause problems in practice

## Introduction

Pursuant to the initiative of the Croatian competition watchdog – Croatian Competition Agency (CCA) – the corrigendum of the Croatian translation of the Council Regulation 1/2003<sup>1</sup> ('Regulation 1/2003') was published in the *Official Journal of the EU* on 30 June 2016.

The main reason why the CCA initiated the corrigendum was the mistake in the Croatian translation of Article 5 paragraph 2 of Regulation 1/2003 which in the English version states as follows:

'Where on the basis of the information in their possession the conditions for prohibition are not met, they [national competition authorities] may likewise decide there are no grounds *for action on their part* [emphasis author's own]'.

The corrigendum corrected the wrong Croatian translation of that paragraph which stated as follows:

'Where on the basis of the information in their possession the conditions for declaration of prohibition are not met, national competition authorities may likewise decide there are no grounds *for starting the procedure* [emphasis author's own]'.

However, this incorrect translation of Regulation 1/2003 has managed to cause significant problems in Croatian judicial practice and has resulted in the decisions of the Croatian High Administrative Court (the 'Court') which are in direct breach of Article 5 paragraph 2 of Regulation 1/2003.

As we will show below, such troublesome practice of the Court is caused not only by the wrong translation of Regulation 1/2003 but also by the inappropriate wording of Article 58 paragraph 1 item 13 of the Croatian Act on the Protection of Competition<sup>2</sup> (the 'Competition Act') which states as follows:

'... CCA especially passes [among others] decisions by which it determines that there was no infringement of competition within the meaning of the provisions of the Competition Act *or Articles 101 or 102 TFEU* [emphasis author's own].'

## Implementation of Article 5 of Regulation 1/2003

Implementation of the rules on competition laid down in Articles 101 (anti-competitive agreements) and 102 (abuse of dominant position) of the Treaty on the Functioning of the European Union (TFEU) is laid down in Regulation 1/2003.

Regulation 1/2003 sets out the cooperation mechanism of control of infringements of Articles 101 and 102 of the TFEU between the European Commission and the national competition authorities of Member States (the 'NCAs').

In that respect, Article 5 of Regulation 1/2003 empowers the NCAs, acting on their own initiative or on a complaint, to require that an infringement be brought to an end, order interim measures, accept commitments, and impose fines, periodic penalty payments or any other penalty provided for in their national law.

On the other hand, to ensure the coherent application of the competition rules in the Member States, if the NCAs based on the information in their possession think that the conditions for prohibition are not met, the NCAs may decide that there are no grounds for action on their part, but they may not decide that the infringement of Articles 101 and 102 of the TFEU does not exist.

In other words, the NCAs can investigate and make decisions on appropriate measures

if Articles 101 and 102 of the TFEU are infringed; however, only the European Commission has the exclusive competence to decide that the infringement of Articles 101 and 102 of the TFEU does not exist.

This distinction was made clear by the European Court of Justice (ECJ) in its judgment in the *Tele2 Polska* case<sup>3</sup> where, in the reference for a preliminary ruling concerning the application of Article 5 of Regulation 1/2003, the ECJ stated the following:

- Article 5 of Regulation 1/2003 must be interpreted as *precluding a NCA*, in the case where, in order to apply Article 102 of the TFEU, it examines whether the conditions for applying that article are satisfied and where, following that examination, it forms the view that there has been no abuse, *from being able to take a decision stating that there has been no breach of that article*.
- The second paragraph of Article 5 of Regulation 1/2003 is directly applicable and precludes the application of a rule of national law which would require a procedure relating to the application of Article 102 of the TFEU to be brought to an end by a decision stating that there has been no breach of that article.

### Troublesome practice of the Croatian court

Pursuant to Article 5 of Regulation 1/2003 and the above interpretation of the ECJ, in the procedures which the CCA would conduct to determine potential infringements of Articles 101 or 102 TFEU, if the CCA found no evidence of the infringement, the CCA would pass a decision on the termination of the procedure due to the lack of legal grounds for the continuance of such a procedure.

The problem occurred in the case brought before the CCA by the undertaking H1 Telekom dd (H1) against the undertaking Hrvatski Telekom dd (HT) for the alleged abuse of a dominant position in breach of Article 13 of the Competition Act and Article 102 of the TFEU.

After opening the infringement procedure against HT and conducting the relevant investigation of the facts of the case, the CCA found no evidence of the infringement and passed the decision on the termination of the procedure due to the lack of legal grounds for its continuance ('First Decision').<sup>4</sup> H1 filed an administrative lawsuit against the First Decision, and the Court annulled the First Decision for the lack of CCA's reasoning<sup>5</sup>. In the repeated procedure, the CCA again

decided that there was no proof of the infringement and therefore again terminated the procedure due to the lack of legal grounds to continue ('Second Decision').<sup>6</sup> H1 also challenged the Second Decision and the Court has once more accepted H1's lawsuit and annulled the Second Decision.<sup>7</sup>

The Court's reasoning behind the annulment of the Second Decision was that the CCA could not simply terminate the procedure by stating that there are no legal grounds to continue. Namely, the Court concluded that the CCA should have applied Article 58 paragraph 1 item 13 of the Competition Act and pass a decision by which it determines that there was no infringement of the provisions of the Competition Act or Articles 101 or 102 of the TFEU.

The Court refused the CCA's arguments stating that the CCA is precluded from passing such decision by the Article 5 paragraph 2 of Regulation 1/2003. Namely, the wrong Croatian translation of that provision of the Regulation which the Court applied essentially stated that if the CCA found no evidence of the infringement it may decide there are no grounds to start the procedure. Since in the present case the CCA had already started the procedure, the Court concluded that the CCA had to end such a procedure by deciding and determining whether there indeed was an infringement of Article 102 of the TFEU.

To summarise, the Court's wrong interpretation of the incorrect Croatian translation of Article 5 of Regulation 1/2003 and the inappropriate wording of Article 58 of the Competition Act, caused the Court to order CCA, to go against the correct meaning and purpose of Article 5 of Regulation 1/2003 and the established practice of the ECJ. The fact that the Court failed to apply the reasoning of the ECJ from the *Tele2 Polska* case and, on those grounds, disregard the wrong Croatian translation of Article 5 of Regulation 1/2003 and the inappropriate wording of Article 58 of the Competition Act, shows that the Court still lacks experience in EU competition matters.

### Outcome

Following the above case, the CCA has successfully initiated the corrigendum of the Croatian translation of Regulation 1/2003. However, the wrong translation of Regulation 1/2003 seems to be only part of the problem.

Namely, the Croatian Competition Act still

contains the confusing provision of Article 58 paragraph 1 Item 13 which permits the CCA to determine the inexistence of infringements of Articles 101 and 102 of the TFEU. Such a provision of the Competition Act has nothing to do with the wrong Croatian translation of Regulation 1/2003, and is in direct contravention of Article 5 paragraph 2 of Regulation 1/2003. Therefore, to avoid any confusion in the future, the Competition Act needs to be amended and exclude any such wording.

Finally, despite the wrong translation of Regulation 1/2003 and the Article 58 of the Competition Act, in light of the existing practice of the ECJ, the Court had the possibility and obligation to apply Regulation 1/2003 in the correct way. Namely, the fact that Regulation 1/2003 is directly applicable and no local laws may be introduced or implemented in contravention of Regulation 1/2003, not only allows but also obliges the Court to disregard the wrong translation of Regulation 1/2003 and any contravening national laws, and to apply Regulation 1/2003 within its true meaning as

interpreted by the ECJ.

This shows the necessity of further systematic professional education of Croatian judges in the area of EU law so that such problems would be eliminated in the future.

#### Notes

- 1 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 (as amended), OJ L 1 of 04-01-2003.
- 2 *Zakon o zaštiti tržišnog natjecanja* (Official Gazette No 79/09, 80/13).
- 3 Case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp z oo (now Netia SA)* [2011], ECLI:EU:C:2011:270.
- 4 CCA's Decision class no UP/I 034-03/2013-01/007, reg no 580-05/76-2014-068 of 8 May 2014; [www.aztn.hr/uploads/documents/odluke/TN/UPI-034-032013-01007.pdf](http://www.aztn.hr/uploads/documents/odluke/TN/UPI-034-032013-01007.pdf).
- 5 Judgment of the High Administrative Court in case no UsII-65/2014 of 16-10-2014; [www.aztn.hr/ea/wp-content/uploads/2015/09/UPI-034-032013-01007.pdf](http://www.aztn.hr/ea/wp-content/uploads/2015/09/UPI-034-032013-01007.pdf).
- 6 CCA's Decision class no. UP/I 034-03/2013-01/007, reg no 580-10/76-2015-079 of 17-12-2014; [www.aztn.hr/uploads/documents/odluke/TN/UPI-034-032013-01007-1.pdf](http://www.aztn.hr/uploads/documents/odluke/TN/UPI-034-032013-01007-1.pdf)
- 7 Judgment of the High Administrative Court in case no. UsII-8/2015 of 29-10-2015; [www.aztn.hr/ea/wp-content/uploads/2016/02/UP-I-034-032013-01-007.pdf](http://www.aztn.hr/ea/wp-content/uploads/2016/02/UP-I-034-032013-01-007.pdf)