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Croatia: When is a Good Time to Argue with the Agency?

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On April 5, 2012 the Croatian Competition Agency ("Agency") rendered a decision rejecting a complaint against the company Prirodni Plin d.o.o. (Natural Gas Ltd – "NG") for abuse of dominant position on the market for supply/sale of natural gas. As a curious but rather usual occurrence in Croatian business practice, the complaint was submitted by the Croatian Chamber of Economy although the original initiative had come from NG's customers. They alleged that certain clauses contained in the standard agreements used for sale and supply of natural gas may have had exploitative and discriminatory effects.

Unfortunately, the Agency overlooked the opportunity to provide feedback on the status of competition on the energy markets, and possible concerns and guidance for the application of competition law in this sensitive industry. The Agency's decision is rather lacking in substantive reasoning, and the legal community will have to wait for another case before embarking on any reasoned debate. However, the decision may nevertheless serve as important procedural guidance as it clearly shows the importance of early engagement in coordinated and substantiated communication with the Agency.

As a background note, the Croatian Competition Act ("Act") maintains a "two-step" approach in antitrust investigations. As the first step, following receipt of the complaint, the Agency will regularly conduct the pre-proceedings without opening the formal investigation against the alleged violator of the competition law rules. According to the Act, the purpose of these pre-proceedings is (i) to establish the situation on the relevant market and assess whether there are grounds for opening the formal proceedings and (ii) to assess whether alleged anticompetitive conduct has possibly only minor effect on effective competition on the relevant market. However, in the Agency's practice this pre-investigation phase is used for a rather broad assessment of both facts and law, and clearly sets the tone of the later, formal investigation. In other words, at the end of this "informal" pre-investigation phase, the Agency would have already made certain conclusions (e.g. on the existence of the abusive behavior) and it would be a rather challenging task for the parties to overturn them in the subsequent formal proceedings.

Unfortunately, the importance of the pre-investigation phase is often overlooked by the undertakings that will typically not treat the Agency's pre-investigation subpoenas with the urgency and seriousness that would be applied after the formal opening of the proceedings. The responses to such requests are more often than not delegated to lower/medium management levels (e.g. sales managers), are not particularly coordinated, and are not thoroughly checked by in-house counsel. Also, external counsel is often engaged only once the formal investigation is initiated. As

a result, the Agency's real concerns are often misread and the Agency generally receives raw, not systematized data (or requested documents) accompanied by summarized explanations prepared by the employees of the relevant business department within the company (e.g. procurement, sales, etc.). Due to the rather low level of "competition law awareness" these additional statements might cause more harm as they could contain various self-incriminating statements and disclosures.

In this case, NG decided to pursue a different route and to engage both top management and outside counsel at a very early phase in the process. As a result, NG managed to present its position to the Agency in a clear and legally well reasoned way thus avoiding the traps of self-incrimination and eventually succeeding in arguing that allegedly suspicious business practices had not been contrary to the provisions of the Act. The Agency's decision rejecting the complaint (especially taking into account that the complaint had been submitted by the Croatian Chamber of Economy) clearly shows how important it is to engage with legal arguments in a very early stage of any Agency's proceedings and to involve top people and legal advisors. It may also show that detailed dialogue with the Agency might be more efficient in this "informal" pre-investigation phase than in the later phase where the undertaking would face uphill struggle with an already built up case file and the Agency's factual and legal conclusions.

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