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Title of paper: Some challenges to successful competition enforcement in an EU candidate country – case of Croatia

ABSTRACT

In a country where competition was not a value in itself for almost fifty years during the socialist period it is no wonder that enforcement of competition rules within the framework of a market oriented democracy needs time to gain strength. Cooperative and collectivistic mindset of the past times still lingers on. This is particularly striking in the way trade associations still operate: undertakings used to collusive contacts for decades when faced with cartel proceedings voluntarily admit anticompetitive contact not realising they were doing anything wrong. From 1997, when the Competition Agency started to operate, until October 2010, when new Competition Act came into force, there was indeed no particular fear from enforcement of competition rules. Small number of cartel cases pursued by the Agency and an ineffective fining system were proving to give competitors leeway with their way of dealing with 'overly competitive' markets. However, the time of innocence has now come to an end. It is not only that the new Competition Act introduced direct fining powers for the Agency and that a possibility to offer leniency is now available. It is the cumulative effect of the fourteen years of competition enforcement that is slowly showing some impact. Although goals of the Agency were not always prioritized and its administrative capacity is in need of improving as ever, the activities of the Agency, especially for companies that have been under scrutiny, are driving larger companies to introduce compliance programmes and the overall awareness as regards negative effects of anticompetitive conduct is slowly rising. Vigorous advocacy efforts seem to finally bear some fruit but the question remains whether advocacy should not give way to a more energetic *ex officio* scrutiny against hard core restraints. This is particularly true for price increase announcements of certain trade associations which are met by what seems to be a meek response of the Agency.

Ever since the competition provisions of the EU/Croatia Stabilisation and Association Agreement (SAA) entered into force in 2002 (via Interim Agreement) providing for application of EU competition law in cases where effect on trade existed, the Competition Agency relied extensively on EU competition rules applying them also in cases of *lacunae* in domestic legislation. EU rules were effectively applied to all cases (with or without cross-border impact) and the effect on trade test was never really part of the analysis. Also, although SAA provided for EU law to be applied only to

restrictive agreements, abuse of dominant position, and state aids, EU competition rules were also applied to merger cases. The Croatian Constitutional Court confirmed in 2008 that on the basis of the SAA EU law did not become part of the Croatian legal system but it held that EU competition law had to be treated as 'an auxiliary means of interpretation'. The question of extensive application of EU rules to cases where no effect on trade existed, and to merger cases has not been submitted to the Constitutional Court so far.

Some challenges in substantial competitive assessment in concrete cases decided by the Agency may be noted. In particular this relates to, what seems to be, an overly meticulous emphasis on defining relevant markets in merger cases instead of a more complex and comprehensive analysis of competitive effects post merger. In the area of cartels the suggestion is to put a more determinate focus on the relevance of anticompetitive contact for establishing infringement, and to downplay possible justifications of price alignment on the basis of similar cost structures.