

**The objectives of competition law and the effective conduct
of the infringement proceedings: Judgments of the Court of Bosnia
and Herzegovina in *BH Telecom* and *Telekomunikacije RS*.
Case comment to the Judgments of the Court of Bosnia and Herzegovina
No. S1 3 U 003765 10 U of 24 April 2013 (*BH Telecom*)
and No. S1 3 U 007875 11 U of 10 October 2013 (*Telekomunikacije RS*)**

by

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I. Infringement proceedings of the competition authority

On 16 February 2010 the Competition Authority of Bosnia and Herzegovina (KV)¹ initiated an investigation into the potential margin squeeze and discriminatory practices applied by the incumbent telecom operator *BH Telecom*². The investigation was prompted by the complaint submitted by an independent telecom operator *Akt. online*, which claimed that *BH Telecom* abused its dominant position by obstructing access to the fixed line network and applying discriminatory pricing on call termination services to the domestic providers.

BH Telecom is a public telecom operator, which along with *Telekomunikacije RS* and *Hrvatske Telekomunikacije Mostar* was declared undertaking with significant market power (SMP) by the sector regulator – Communications Regulatory Agency (RAK)³. Pursuant to the Law on Communications⁴ public telecom operators are obliged to provide interconnection to their networks. The SMP status allows RAK to regulate the interconnection charges in order to assure that they are cost-based. RAK has approved

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¹ *Konkurencijsko vijeće BiH*, <http://bihkonk.gov.ba/>.

² KV Decision No. 01-05-26-028-11-II/2009 dated 16.02.2010. See Alexandr Svetlicinii, The Competition Authority of Bosnia & Herzegovina commences an investigation into potential margin squeeze practices of the incumbent telecom operators (BH Telecom / Telekomunikacije Republike Srpske), 16 February 2010, *e-Competitions Bulletin* June 2010, Art. N° 31479.

³ *Regulatorna agencija za komunikacije BiH*, <http://rak.ba/bih/>.

⁴ *Zakon o komunikacijama*, Official Gazette B&H No. 31/03, 75/06.

the 'Reference Interconnection Offer' to be applied by the public telecoms. Once the formal criteria for interconnection are met by the third party the incumbent provider must set the term for negotiations and conclude them within ninety days from the set date. *Akt.online* submitted that *BH Telecom* concluded the interconnection agreement only after one year from the commencement of negotiations. Moreover, according to the complainant, *BH Telecom* has effectively delayed the implementation of the interconnection and conditioned it with unrelated requests, which led to termination of *Akt.online*'s agreements with international operators and caused substantial loss of profit.

Akt.online argued before the KV that *BH Telecom* has abused its dominant position based on the ownership of the essential facility (fixed land line networks) thus preventing liberalization of telecommunications market in Bosnia and Herzegovina. *Akt.online* explained that it set out to offer call termination service to foreign telecom operators and for that purpose it had to lease the fixed lines from the incumbent telecoms. The complainant argued that following the EU practice in this field call termination charges for international calls should be equal to those imposed on local calls due to the absence of any cost difference for the network owners. At the same time, there was a minimal difference in price between the call termination fees on the wholesale and retail level. Besides alleging the existence of anti-competitive margin squeeze practices, *Akt.online* submitted that *BH Telecom* was liable for applying discriminatory conditions to the domestic service providers by offering better terms to the foreign telecom operators that concluded their interconnection agreements directly with the incumbent.

On the basis of the available evidence the KV decided to open an investigation and following the analysis of the information supplied by the parties was expected to issue a decision on the merits. The B&H Competition Act mandates the KV to issue its final decision (concerning existence of abuse or absence thereof) within four months after the commencement of the investigation⁵. The law also allows the KV to extend this period for the further three months where it is necessary for the collection of additional evidence or where the investigation concerns important industries or markets, as could be the case with the telecommunications. On 14 June 2010 the KV ordered the extension of the investigation in *BH Telecom* case⁶. As explained in the KV's decision the extension was partly caused by the requests of *BH Telecom* asking for more time to submit the requested documents and prepare for the oral hearing. Upon the expiration of the additional three-month period, the KV has not, however, issued a decision on the merits. In such cases the B&H Competition Act provides that if the KV does not issue an infringement decision within the prescribed time limits, 'it shall be deemed that concluded agreement or practice of the economic entity is not abuse of dominant position'⁷. Furthermore, at the request of the undertaking the KV

⁵ Article 41(1) of the B&H Competition Act (*Zakon o konkurenciji*, Official Gazette B&H, No. 48/05, 76/07, 80/09) defines the following time limits for the KV's procedures/investigations: (a) 6 months for anticompetitive agreements, (b) 3 months for individual exemptions; (c) 4 months for abuses of dominance, and (d) 3 months for the assessment of concentrations.

⁶ KV Decision No. 01-05-26-028-48-II/09 dated 14.06.2010.

⁷ B&H Competition Act, Article 11(2).

shall issue a no-infringement decision, confirming the fact that since the infringement decision was not issued within the prescribed time limits, 'that concluded agreement or the practice of the economic entity is not abuse a dominant position'⁸. Upon a request of *BH Telecom*, the competition authority confirmed in an administrative decision that in the absence of a decision on the merits, it should be concluded that *BH Telecom* has not abused its dominant position⁹.

On 12 October 2011 the KV closed similar investigation into the alleged abuse of dominant position on the part of another incumbent telecom operator *Telekomunikacije RS*¹⁰. The KV's investigation was prompted by a complaint lodged by an independent telecom operator *Crumb group* who claimed that *Telekomunikacije RS* abused its dominant position by obstructing access to its landline network and applying discriminatory access policy towards independent providers.

Crumb group was an independent telecom operator, which has been licensed by the RAK to provide fixed telephony services. *Crumb group* has approached *Telekomunikacije RS* with the request to conclude an interconnection agreement. At the first meeting with the incumbent *Crumb group* was informed that the standard form of the agreement as well as the interconnection charges have not yet been developed by the incumbent. At the same time, as *Crumb group* has subsequently learned, *Telekomunikacije RS* has already concluded the interconnection agreement with another independent provider. This fact prompted *Crumb group* to claim that *Telekomunikacije RS* has abused its dominant position by favoring *Crumb group*'s rivals and placing the latter at a competitive disadvantage. After the long process of negotiations with *Telekomunikacije RS*, which involved the intervention of the sector regulator, *Crumb group* finally managed to conclude an interconnection agreement with *Telekomunikacije RS*. At the same time, as claimed by *Crumb group*, the independent provider could not maintain its traffic due to the limited technical capacity provided by the incumbent.

Crumb group argued that *Telekomunikacije RS* has abused its dominant position and prevented the liberalization of telecommunications market thus preserving its uncontested dominance. The applicant argued that following the EU practice in this field call termination charges for international calls should be equal to those imposed on local calls due to the absence of any cost difference for the network owners. At the same time, there was a minimal difference in price between the call termination fees on the wholesale and retail levels. Apart from the alleged anti-competitive margin squeeze practices, *Crumb group* argued that *Telekomunikacije RS* was also applying discriminatory conditions to the domestic service providers by offering better terms

⁸ B&H Competition Act, Article 11(3).

⁹ KV Decision No. 01-05-26-028-63-II/2009 dated 04.11.2010. See A. Svetlicinii, 'The Bosnian & Herzegovinan Competition Authority closes the investigation into the alleged margin squeeze practices of the incumbent telecom operator (BH Telecom)' 4 November 2010, *e-Competitions Bulletin* November 2010, Art. N° 33572.

¹⁰ KV Decision No. 05-26-2-028-76-II/10 dated 12.10.2011. See A. Svetlicinii, 'The Competition Authority of Bosnia & Herzegovina closes the investigation into the alleged abusive practices of the incumbent telecom operator without reaching a decision on the merits (Telekom RS/Crumb group)' (2011) N° 40544 *e-Competitions Bulletin*.

to the foreign telecom operators that concluded their interconnection agreements directly with the incumbent.

On the basis of the available evidence on 2 March 2011 the *KV* opened an investigation and following the analysis of the information supplied by the applicant it was expected to issue a decision on the merits. On 8 June 2011 the *KV* ordered the extension of the investigation in relation to *Telekomunikacije RS*¹¹. Upon the expiration of the additional three month period the *KV* has not issued the decision on the merits and upon request of the parties the competition authority confirmed that in the absence of the decision on the merits, which had to be adopted within the prescribed time limits, it should be concluded that *Telekomunikacije RS* has not abused its dominant position.

Unlike the *KV*'s decision concerning the alleged abuse of dominance in *Telekomunikacije RS* case, the *Crumb group*'s claim concerning the existence of an anti-competitive agreement between *Telekomunikacije RS* and another independent provider – *Aneks* – has been dismissed by the *KV* in its decision on the merits¹². The *KV* defined the relevant market as the market for interconnection services on the territory of the Republic of Srpska where the *Telekomunikacije RS*'s infrastructure was located. The applicant has essentially alleged that the interconnection agreement with *Aneks* was the result of the *Telekomunikacije RS*'s abuse of its dominant position by favoring certain independent telecom providers (such as *Aneks*) while placing the others (such as *Crumb group*) at a competitive disadvantage. Unlike Article 101 TFEU, which prohibits anticompetitive agreements by 'object or effect', the B&H Competition Act for the existence of an anti-competitive agreement requires both: 'object and effect'¹³. The *KV* held that such agreements would normally involve the coordination of the competitors' conduct, leading to the exclusion of other competitors from the relevant market. As a result, the *KV* concluded that the applicant has failed to present the evidence that the interconnection agreement between *Telekomunikacije RS* and *Aneks* involved the requisite anticompetitive 'object and effect'.

II. Proceedings before the Court of Bosnia and Herzegovina

Akt.online challenged the decision of the *KV* in *BH Telecom* case before the Court of Bosnia and Herzegovina¹⁴ The applicant noted that pursuant to the

¹¹ *KV* Decision No. 05-26-2-028-40-II/10 dated 08.06.2011.

¹² *KV* Decision No. 05-26-2-028-92-II/10 dated 17.11.2011. See A. Svetlicinii, 'The Competition Authority of Bosnia & Herzegovina finds no anticompetitive practices on the market for telecom interconnection services in the absence of the requisite anticompetitive object and effect (*Crumb/Telekomunikacije Republike Srpske, Aneks*)' (2011) N° 40995 *e-Competitions Bulletin*.

¹³ B&H Competition Act, Article 4(1).

¹⁴ *Sud Bosne i Hercegovine*, <http://www.sudbih.gov.ba/>.

provisions of the B&H Competition Act¹⁵, the KV should conduct its proceedings in conformity with the Administrative Procedure Act (ZUP)¹⁶. The ZUP¹⁷ mandates the administrative agency to respect rights and freedoms of the citizens in line with the B&H Constitution¹⁸ and the European Convention on Human Rights¹⁹. The ZUP also requires the administrative authorities to establish all facts relevant to the case under consideration²⁰. According to the applicant, by failing to adopt decision on the merits the KV has infringed the applicant's right to a fair trial (within reasonable time) and right to property guaranteed by the B&H Constitution²¹. It was also submitted that the provision of the B&H Competition Act²², providing for the default conclusion that failure to reach a decision on the merits amounts to the absence of an infringement, is unconstitutional. Similar challenge was launched by *Crumb group* against the KV's decision in *Telekomunikacije RS* case. The applicant in that case argued that by failing to investigate the factual situation of the case the competition authority has infringed its own procedural rules and the general provisions of the ZUP.

In the *BH Telecom* case the Court found that the infringement proceedings conducted by the KV lasted unreasonably long taking into account the nature of the allegations advanced by the complainant. The Court noted that the complaint was primarily based on the allegation that *BH Telecom* discriminated domestic providers by offering to the foreign telecoms lower prices for call termination in own network. Therefore, by requesting *BH Telecom* to provide the texts of the interconnection agreements with domestic and foreign operators the KV could conduct the comparison of the prices and determine the existence of discrimination or the absence thereof. The Court noted that the KV has spent eight months from the start of the investigation until the closing of the case without carrying out substantial investigative activities. This fact was evident from the many delays in hearings; these were caused by the attempts of the parties to find a mutually acceptable solution, and the election of new members of the competition authority. The Court concluded that this inefficient conduct of the investigation was not objectively justified and was contrary to the objective of the B&H Competition Act: the protection and promotion of market competition in Bosnia and Herzegovina²³. As a result, the Court has annulled the KV's no-infringement decision in *BH Telecom* case.

¹⁵ B&H Competition Act, Article 26.

¹⁶ *Zakon o upravnom postupku*, Official Gazette B&H, No. 29/02.

¹⁷ B&H Administrative Procedure Act, Article 5.

¹⁸ Constitution of Bosnia and Herzegovina, adopted on 21.11.1995, entry into force 14.12.1995. It is Annex IV of the Dayton Peace Agreement reached in Dayton, OH, USA on 21.11.1995 and formally signed in Paris on 14.12.1995.

¹⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221.

²⁰ B&H Administrative Procedure Act, Article 5.

²¹ Constitution of Bosnia and Herzegovina, Article II(3).

²² B&H Competition Act, Article 11(2).

²³ B&H Competition Act, Article 1.

The Court has also addressed the length of the KV's investigation in the *Telekomunikacije RS* case. In that case the competition authority has conducted the proceedings for the initial four months with an additional three month extension. The Court noted that the major argument of the complainant concerned the existence of the interconnection agreement that *Telekomunikacije RS* has already concluded with some independent providers; the same was refused to *Crumb group*. In order to verify the allegations of the complainant the KV had to establish the existence of the interconnection agreements with other operators or their absence. The Court concluded that the length of the investigation in the light of the actual investigatory activities carried out by the KV was unjustified and contrary to the objective of the B&H Competition Act. As a result, the Court has annulled the KV's no-infringement decision in *Telekomunikacije RS* case.

III. Repeated infringement proceedings of the competition authority

Following the annulment of its no-infringement decision in *BH Telecom* case the KV has repeated its infringement proceedings against the incumbent telecom operator and on 6 February 2014 issued an infringement decision²⁴ establishing abuse of dominant position in the form of 'making the conclusion of contract subject to acceptance by the other party of additional obligations which, by their nature or according to commercial usage, have no connection with the subject of such contract'²⁵. The sanction imposed on *BH Telecom* for the specified infringement amounted to BAM 150.000 (approx. EUR 76.700).

In its repeated investigation the KV determined two relevant product markets: interconnection services to *BH Telecom* fixed landline network and international call termination in *BH Telecom* fixed and mobile networks. The competition authority established that the delay in execution and *BH* implementation of the interconnection agreement between *Akt.online* and *Telecom* was caused by the refusal of the latter. *BH Telecom* was insisting that *Akt.online* should terminate its agreement with another operator concerning international call services that *Akt.online* was providing in violation of the sector legislation and without appropriate license from RAK. The KV took into account the fact that sector regulator has established the infringement of sector regulations by *Akt.online* and ordered the latter to terminate the specified agreement. Nevertheless, the competition authority concluded that delay in execution of interconnection agreement by *BH Telecom* could not be excused by the fact that *Akt.online* was acting in violation of sector regulations. According to the KV, said conduct by *BH Telecom* amounted to abuse of dominant position and insisting on termination of the agreement with other operator was not related to the subject of the interconnection agreement.

²⁴ KV Decision No. 05-26-3-01-70-II/11 dated 06.02.2014.

²⁵ B&H Competition Act, Article 10(2).

In relation to the alleged margin squeeze and price discrimination the KV established the following facts. The prices for international call termination services in own network were not regulated by the RAK and telecom operators were free to establish the prices in direct negotiations with foreign and domestic operators. Following the comparison of the prices charged by *BH Telecom* for call termination services provided to foreign operators the KV concluded that no discrimination in favour of foreign telecom providers can be established. As a result, the KV has dismissed the abuse of dominance claim on that account. When determining the amount of fine to be imposed on *BH Telecom* the KV has considered short duration of the infringement (six months) and the fact that RAK has confirmed the violation of sector regulations by *Akt.online*, the fact has been used by *BH Telecom* in order to condition the conclusion of the interconnection agreement with *Akt.online*.

IV. Comment

The significance of the Court's judgments in *BH Telecom* and *Telekomunikacije RS* cases has multiple dimensions. One of them can be seen in the effectiveness of the judicial review of the KV's decisions. Generally, there have been only few KV's decisions that have been quashed by the Court. The judicial statistics demonstrates strong record of the KV defending its decisions before the Court: there were no successful appeals in 2012²⁶ and 2010²⁷; and only one successful appeal in 2009²⁸. The national judiciary has agreed with the competition authority in multiple cases, related to the interpretation of substantive and procedural provisions of the B&H Competition Act. For example, the B&H Competition Act instructs the KV to consider EU competition law and jurisprudence in domestic cases²⁹. The KV has followed this guidance and on several occasions referred to the EU competition rules and standards in its infringement decisions³⁰. This practice has been accepted by the Court, which has upheld the abuse of dominance decisions where KV has made references to the EU case law³¹.

²⁶ See KV 2012 Annual Report, available at <http://bihkonk.gov.ba/datoteka/IZVJESTAJ-ZA-2012-GODINU.pdf>.

²⁷ See KV 2010 Annual Report, available at <http://bihkonk.gov.ba/datoteka/IZVJESTAJ-o-radu-2011bos.pdf>.

²⁸ See KV 2009 Annual Report, available at http://bihkonk.gov.ba/datoteka/izvjestaj_2009.pdf.

²⁹ B&H Competition Act, Article 43(7): 'Council of Competition, for the purpose of assessment of a given case, can use the case law of the European Court of Justice and the decisions of the European Commission'.

³⁰ See A. Svetlicinii, 'The Competition Authority of Bosnia & Herzegovina applies EC competition law standards prosecuting exclusive importer of automobiles for abuse of dominant position (ASA Auto / MRM export-import, "Volkswagen" case)' (2009) N° 26443 *e-Competitions Bulletin*.

³¹ See Z. Mekšić, 'Jurisdikcija Suda EU u praksi Suda BiH' ['Jurisprudence of the CJEU in the practice of the Court of B&H'] (2012) 8 *Sveske za javno pravo* 70-76. The author comments the Judgment of the Court of B&H No. S1 3 U 005412 10 Uvl dated 15.03.2012 where the

In the present cases the Court has demonstrated its willingness to review the KV's application of the most strait-forward procedural rules contained in the B&H Competition Act. In light of the initially defunct investigations carried out by the KV in the *BH Telecom* and *Telekomunikacije RS* cases, the Court quashed the competition authority's no-infringement decisions as it was established that the KV was not following the objectives of competition law, that is, to take measures for the protection and promotion of competition. In this sense the cases set the precedent that the KV will be unable to use the respective default provisions of the B&H Competition Act in cases where it is unwilling to issue a decision on the merits. This interpretation of the respective provisions of the B&H Competition Act could become a strong tool for the parties challenging the effectiveness of the KV's investigations and failures to act. At the same time, it should be stressed that the Court did not follow the arguments advanced by the applicants concerning the unconstitutionality of the respective provisions and their contradiction with the right to fair trial. Procedural considerations aside, it could be suggested that the Court has not denied the right to fair trial and legal certainty guaranteed to the undertakings under investigation by the KV. The approach taken by the Court demonstrates that the responsibility for the effective conduct of the infringement proceedings lies with the competition authority and every time when the default provisions are applied by the KV the latter will have to prove that it has acted efficiently in collecting and analyzing the available evidence in order to reach the decision on the merits.

It should be also noted that the KV has not opposed this approach of the Court impliedly sharing the Court's position. Even though in the course of the repeated investigation *BH Telecom* argued before the KV that the competition authority can adopt the identical decision even after the judicial annulment, the KV has proceeded differently. Without disputing the Court's assessment of its actions, the KV has analyzed the available evidence and completed the case with the decision on the merits. It is expected that the repeated investigation in *Telekomunikacije RS* case should be completed in a similar manner. Taking into account that the B&H Competition Act mandated the KV to initiate the infringement proceedings upon the receipt of a complaint from an interested party³², the precedent established by the Court should contribute to the efficiency of the KV's investigations. As a result, both the complainants and the undertakings under investigation would enjoy an increased legal certainty that the KV will complete the investigation within the mandatory time limits as prescribed by the law.

B&H court refers to the jurisprudence of the CJEU when reviewing an infringement decision of the B&H competition authority in an abuse of dominance case concerning the refusal to deal in the automobile market.

³² B&H Competition Act, Article 32(2): "Council of Competition is obliged to adopt a conclusion of initiation of proceedings within 30 days of receipt of complete and adequate request."