

A R T I C L E S

Judicial review in competition cases in Croatia: Winning and losing arguments before the High Administrative Court of the Republic of Croatia

by

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This paper is a product of work that has been fully supported by the Faculty of Law Osijek Josip Juraj Strossmayer University of Osijek under the project: Legal certainty, rule of law and effective legal protection in commercial, insolvency, civil and administrative proceedings as a requirement for stable development of the economy and society.

An earlier version of this paper was presented at the 6th Zagreb Competition Law and Policy Conference in Memory of Dr. Vedran Šoljan, Challenges to the Enforcement of Competition Rules in Central and Eastern Europe, 12–13 December 2019, Zagreb, Croatia.

Article received: 29 May 2020, accepted: 27 July 2020.

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Abstract

The paper provides a systematic insight into judicial control of Croatian Competition Agency (CCA) decisions in Croatia. Its first part will explain how the applicable model of judicial control and CCA powers were changed over the years. The central part of the paper will be dedicated to the current model of judicial control of CCA decisions, to the powers of the High Administrative Court of Republic of Croatia (HACRC) and to the scope of judicial review in competition cases. In the last part of the paper, the author will present the results of a survey on the most successful and unsuccessful appeal arguments in competition cases before the HACRC in the five year period from 2015 until 2020. In its conclusion, the author will give a critical review of the quality and adequacy of the current model of judicial control in competition cases in Croatia, and will suggest changes that would, in the authors view, result in significant improvements.

Résumé

L'article donne un aperçu systématique du contrôle judiciaire des décisions de l'Agence croate de la concurrence en Croatie. En particulier, la première partie expose la manière dont le modèle applicable de contrôle judiciaire et les pouvoirs de l'Agence croate de la concurrence ont été modifiés au fil des ans. La partie centrale du document est dédiée au modèle actuel de contrôle judiciaire des décisions de l'Agence croate de la concurrence, aux pouvoirs de la Haute Cour administrative de la République de Croatie et à la portée du contrôle judiciaire dans les affaires de concurrence. Dans la dernière partie de l'article, l'auteur présente les résultats d'une analyse des motifs de recours les plus et les moins efficaces dans les affaires de concurrence devant la Haute Cour administrative de la République de Croatie au cours de la période de cinq ans (de 2015 à 2020). Dans la conclusion, l'auteur propose un examen critique de la qualité et de l'adéquation du modèle actuel de contrôle judiciaire dans les affaires de concurrence en Croatie, et suggère des changements qui pourraient entraîner des améliorations considérables.

Key words: competition law; standard and intensity of judicial review; procedure; High Administrative Court of the Republic of Croatia; Croatia.

JEL: K21, K23, K49, L41, L42

I. Introduction

Judicial review is the barometer of the health of governance in a particular jurisdiction (Forsyth, 2010, p. 3). In competition cases, judicial review seeks to place the competition authority and the undertakings on relatively equal footing, giving both parties a reasonable opportunity to present their case under conditions which do not place them at a substantial disadvantages vis-a-vis their opponent¹.

Only such balanced approach ensures that the goals of competition law are achieved. In that sense, balanced, timely and effective judicial control is a key to efficient competition law enforcement.

While in some countries there are substantial bodies of scholarly work and/or other type of studies on different aspects of judicial review in competition cases, judicial review of the decisions issued by the Croatia Competition Authority (hereinafter; CCA) is in a way a disregarded (neglected) topic. Since that part of the puzzle is missing, it is hard to provide any relevant information or conclusions on the intensity, complexity and quality of judicial review.

The purpose of this paper is to fill that gap and, based on the conducted research, to provide closer insight into the judicial activity in competition cases in Croatia. In that sense, in the first part of the paper, the author will explain how the model of judicial control and CCA powers have changed over the years. The central part of the paper will be dedicated to the current model of judicial control of CCA decisions, powers of the HACRC and the scope of judicial review in competition cases. In the last part of the paper, the author will present the results of a survey of the most successful and unsuccessful appeal arguments in competition cases before the HACRC in the latest five-year period. Based on the findings, the author will express personal views and reflections on the adequacy and efficiency of judicial review in competition cases in Croatia.

II. Looking back: 25 years of Competition Law in Croatia with special emphasis on competent Courts and the main features of judicial review in competition cases in Croatia

Competition law in Croatia, as it is the case for many other east European countries, is a relatively recent phenomena. The first Competition Act (hereinafter; CA) was enacted in 1995². The Croatian Competition Agency³

¹ T-36/04 *API v. Commission*, judgment 12 September 2007, ECLI:EU:T:2007:258, par. 79.

² Competition Act was published in OJ No. 48/95 from 14 July 1996. It entered into force on 22 July 1995.

³ CCA was established by the Decision of the Parliament of the Republic of Croatia from 20 September 1995 (Published in OJ No. 73/95 and 79/95).

(CCA) was established in the same year; however, it only started working two years later, in 1997. Therefore, competition law enforcement in Croatia officially started in 1997.

The first CA was rather modest and simple. It only had 45 articles. However, having in mind the fact that it was brought about in post-war times, in very specific political and economic conditions, it doesn't seem wrong to conclude that, on a general level, this first CA created a solid foundation for the future implementation of competition law in Croatia. Nonetheless, this Act also had numerous imperfections, including particularly problematic rules on judicial control of CCA decisions.

With this first CA, Croatia started to implement a model of judicial review of CCA decisions that was in force for more than 10 years and which made the role of the CCA largely marginal and irrelevant. According to that Act, the CCA had powers to decide on infringements but not on fines. It was the Misdemeanour Court⁴ who was deciding on fines, while the Administrative Court of Republic of Croatia was deciding on appeals against CCA decisions.

According to that model, two courts were involved in competition law enforcement: the Misdemeanour Court, which was deciding on the amount of fine when the CCA brought a decision on infringement, and the Administrative Court of Republic of Croatia which was deciding on the legality of CCA decisions.

With regard to the Misdemeanour Court's powers to set up fines, the Court had broad discretion to decide on the amount of the fines. However, fines for infringements of competition rules set by Misdemeanour Court were quite low, so that the deterrent effect of the fining policy was not achieved. When it comes to the procedure before the Administrative Court of Republic of Croatia on the control of the legality of CCA decisions, it was ineffective. Proceedings lasted too long and there was no oral hearing. In general, this was a new legal discipline and the Administrative Court of Republic of Croatia was not adequately prepared to deal with this type of very specific and complex cases.

In its annual reports, the CCA was regularly expressing dissatisfaction with that aspect of competition law enforcement. For example, in the Annual report prepared for the Croatian Parliament for years 1998–1999⁵,

⁴ The Misdemeanour Court is a specialized court which decides in accordance with the Misdemeanour Act. According to Article 5 of the Misdemeanour Act, the Misdemeanour Court is entitled to prescribe one of the following sanctions: 1. penalty (financial and prison penalties), 2. protective measures, in accordance with Article 50, Paragraph 2, of the Act. (2) Misdemeanour legal sanctions that are prescribed by the Act are: 1. warning measures (reprimand and conditional conviction), 2. protective measures (Article 50, Paragraph 1), 3. educational measures. See: <http://pak.hr/cke/propisi,%20zakoni/en/MisdemeanourAct/EN.pdf> (2.7.2020).

⁵ Agencija za zaštitu tržišnog natjecanja. (1999). *Izvešće o radu u Agencije za zaštitu tržišnog natjecanja za 1998 i 1999*, Zagreb; Agencija za zaštitu tržišnog natjecanja, p. 12–13,

the CCA said in this regard that it had not been satisfied with the way or the speed of resolving competition cases before the Administrative Court, nor was it satisfied with the Misdemeanour Court's decisions on fines. The reasons for those dissatisfactions were more than justified. For example, in the aforementioned Annual report, in the two year period from 1997 until February 1999, the CCA filed a claim before the Misdemeanour Court against a total of 18 undertakings, requesting from the Misdemeanour Court to fine those 18 undertakings for their infringements of competition law rules. However, none of those 18 undertakings got fines⁶.

In 2003, the Croatian Parliament formulated a new Competition Act (hereinafter; 2003 CA)⁷. That Act brought forward numerous improvements⁸, but the judicial review model established by the first CA unfortunately remained the same. As it was the case according to the first CA, the CCA was deciding on infringements, while the Misdemeanour Court was deciding on fines against the offenders of competition law rules. The Administrative Court of Republic of Croatia continued to be a judicial body, whose task was to decide on claims against CCA decisions regarding the legality of such decisions.

Such model of judicial control of CCA decisions was in force until 2009 when the Croatian Parliament enacted its third CA, which is still in force today⁹. This CA (hereinafter; 2009 CA) came into force on 1 October 2009, however, it started to apply from 1 October 2010. With that Act, Croatia conducted a comprehensive competition law reform. Powers of the CCA were significantly increased and, among other things, the CCA was finally given the right to decide on fines. So the power to set up a fine for an infringement of competition law rules was taken away from Misdemeanour Court and given to the CCA. Moreover, the 2009 CA also introduced a set of novelties with regard to the procedure before the CCA, and the control of the legality of CCA decisions by (now) High Administrative Court of Republic of Croatia. With regard to that, it should be emphasized that Croatia also conducted in 2010 a comprehensive reform of its judicial system¹⁰. An important aspect

available at http://www.aztn.hr/uploads/documents/tn/godisnja_izvjesca/godisnje_izvjesce_AZTN_3.1998-4.1999.pdf (14.5.2020).

⁶ *Ibidem*, p. 12 (table 5).

⁷ Competition Act was published in OJ No. 122 /03 from 30 July 2003.

⁸ See the explanations and comments on the main aspects of the 2003 CA reform provided by the Head of the CCA Cerovac M., available at http://www.aztn.hr/uploads/documents/otmena_strucni_clanci/mladen_cerovac/10_mc.pdf (17.5.2020).

⁹ This most recent CA was published in OJ 79/09 from 8 June 2009 but it started to apply from 1 October 2010. It has been amended in 2013 after Croatia became full member state of the EU and when new rules on the application of EU law came into the force.

¹⁰ See on the main aspects of the judicial reform: Hrvatski Sabor. (2010). Strategija reforme pravosuđa od 2011. do 2015. godine, Hrvatski Sabor, <https://pravosudje.gov.hr/UserDocsImages/>

of that reform was a new model of an administrative justice system. After the adoption of the new Administrative Dispute Act¹¹ in 2010, a two-tier administrative courts system was introduced; administrative courts became courts of full jurisdiction and the Administrative Court of Republic of Croatia, which was previously the only administrative court in the Republic of Croatia, became the second instance court and, at the same time, the highest judicial instance in administrative matters in Croatia.

Although the HACRC is a second instance court, and is typically deciding on appeals (claims) against the decisions of the first instance administrative courts, by virtue of Article 67 of the 2009 CA, the HACRC became competent to decide in the first instance on claims against CCA decisions.

Since such regulatory model is obviously unusual, one can raise the question why the legislator decided that the HACRC, as a supreme judicial administrative body, should take the role of a first instance court and decide in the first instance? Is such political decision justified?

Although there are surely arguments which speak against such a regulatory model, there are at least two reasons why such political decision can be considered wise.

Firstly, by assigning competition law cases to the highest judicial administrative body in Croatia, the legislator is sending a message about the importance of competition law.

Secondly, competition law cases require certain (higher) level of judicial skills, expertise and experiences. Therefore, it was the legislator's presumption that the judges of the HACRC would be up to the task.

Even though judges of the HACRC are the most experienced and the most skilled administrative law judges in the country, it turned out that even for them, competition law enforcement and judicial review of competition law decision have represented a real challenge.

Starting from 2012, Croatia has begun with an implementation of a new model of judicial review and a new era of competition law enforcement started in Croatia. In 2012, the CCA started to impose fines and in 2013, when Croatia became a full member of the EU, it started to apply EU law, whilst solely the HACRC decided on fines and on the legality of CCA decision.

Regardless the potential criticism that one may have on the judicial review of CCA decisions, there is no doubt that judicial review in competition cases after 2012 became more profound and stringent. Unlike the previous period during which competent courts, including the Administrative Court

dokumenti/Strategija%20reformne%20pravosu%C4%91a,%20za%20razdoblje%20od%202011.%20do%202015..pdf. (18.5.2020).

¹¹ Administrative Dispute Act was published in OJ No. 20/10 and was amended on several occasions 143/12, 152/14, 94/16 – OjRUSRH i 29/17.

of Republic of Croatia, were only conducting the so-called ‘control of the legality’ of CCA decisions, which was in most cases a rather general judicial control, the HACRC started to conduct more intensive judicial review of CCA decisions.

III. Main features of judicial review in competition cases before the High Administrative Court of Republic of Croatia

Regarding the judicial review before the HACRC, there are numerous relevant issues that are worthy of a more detailed analysis. However, an analysis of all procedural and substantive aspects of judicial control of competition cases before the HACRC, is beyond the scope of this article.

In the following part, the article will focus solely on those rules of judicial review that are contained in the 2009 CA, which determine the main aspects of judicial control of CCA decisions before the HACRC. In that sense, three issues will be analysed: first, the appeal procedure before the HACRC; second, the scope of judicial review; and third, the legal remedies against HACRC decisions.

1. Appealing CCA decisions: reasons, procedure and parties to the proceedings

The appeal procedure and the parties’ rights with regard to the appeal procedure before the HACRC in competition cases are regulated by two acts: the Law on Administrative Disputes and the 2009 CA. Although the Law on Administrative Disputes is the principal law applicable in the procedure before the HACRC, in competition cases the rules of the 2009 CA prevail. In competition cases, the Law on Administrative Disputes applies as a *lex generalis* only if a particular legal issue is not regulated by the 2009 CA.

Although the 2009 CA regulates the judicial control of CCA decisions with only two articles: Article 67 and Article 68 of the 2009 CA, those two provisions regulate most issues that relate to judicial review of CCA decisions before the HACRC. Therefore, there isn’t much space for the application of the Law on Administrative Disputes. In that sense, Article 67 of the 2009 CA regulates: the type of legal remedy against CCA decisions, the deadlines for lodging a claim, the reasons for the claim, the composition of a judicial panel, the legal effects of submitted a claim, etc.; Article 68 of the 2009 Act regulates most issues regarding the review of the facts before the HACRC and the standard of judicial review.

Regarding the legal remedy against CCA decisions, Article 67(1) of the 2009 CA prescribes that against the decision of the CCA, no appeal is allowed. In order to challenge a CCA decision, the unsatisfied party must file a claim (lawsuit) for an administrative dispute at the HACRC.

Moreover, according to the same Article 67(1), not all types of CCA decisions can be contested.

A lawsuit can be lodged only against the final decision; a lawsuit (claim) is not allowed against procedural orders (conclusions) (Pecotic Kaufman, Butorac Malnar and Aksamovic, 2019, p. 212) as the CCA usually decides on the parties' procedural rights.

To clarify, during administrative proceedings, the CCA adopts one of two possible types of decisions, namely procedural orders (conclusions) and a (final) decision. A lawsuit can be lodged only against a (final) decision, while a party to the proceedings cannot file a lawsuit (claim) against procedural orders. Since the CCA decides by way of a procedural order on numerous rights, such as standing,¹² initiation of the proceedings¹³, interim reliefs¹⁴, etc., the question is how can one challenge procedural orders?

An answer to this question is given in Article 67(4) where it says that a procedural order may be challenged by filing a complaint for an administrative dispute at the HACRC against the decision resolving the administrative matter in question¹⁵. This means that, when the CCA reaches a final decision on the merits of a claim, an injured party can bring a claim against that decision, challenging the part of the decision related to the contested procedural order.

Filing a claim to the HACRC does not suspend the decision, except the part of the decision regarding the fine. Therefore, when a party to proceedings files a lawsuit, and is contesting the part of the decision related to the fine, filing the lawsuit will suspend the enforcement of the decision on that fine until the HACRC reaches a final decision.

The 2009 CA in its Article 67 precisely specifies the reasons for a lawsuit. A lawsuit can be lodged on the following points:

- (a) misapplication or erroneous application of substantive provisions of competition law;
- (b) manifest errors in the application of procedural provisions;
- (c) incorrect or incomplete facts of the case;
- (d) inappropriate fine and other issues contained in the decision of the Agency¹⁶.

¹² Article 36 of the 2009 CA.

¹³ Article 39 of the 2009 CA.

¹⁴ Article 51(4) of the 2009 CA.

¹⁵ Article 67(3) of the CA.

¹⁶ Article 67(1) of the 2009 CA.

An issue that also arises in relation to a claim before the HACRC is who has standing before the HACRC. In other words, who is entitled to challenge a CCA decision?

A claim against a CCA decision establishing an infringement can be filed only by an injured party, whereas a claim against a decision that no infringement of competition rules has been committed can be submitted by a person who filed the initiative and a person who has been granted the same procedural rights (Pecotic Kaufman, Butorac Malnar and Aksamovic, 2019, p. 213).

All claims are decided by a panel of three judges.¹⁷ The deadline for filing a claim is 30 days from the receipt of the decision¹⁸.

When deciding on a claim, the HACRC can bring one of the following decisions: it can dismiss the claim, reject it or accept it. The HACRC will dismiss the claim when it finds the claim to be incomplete. If the HACRC establishes that the claim is unfounded, it will reject the claim. When the HACRC finds that the claim is well-founded it will accept the claim¹⁹.

When the HACRC concludes that a claim is well-founded, it has a few options: it can either nullify the decision of the CCA, it can remand it to the CCA ordering an action, or it can resolve the matter itself.

Although the HACRC is entitled to decide on the merits of a case and to replace the CCA decision, according to available data, the HACRC has never used this power. In all cases in which the HACRC has accepted a plaintiff's allegations in the lawsuit and annulled the CCA decision, it so far always remanded the cases back to the CCA for reconsideration.

2. The scope of judicial review: review of legality or full review

One frequent issue arising during the judicial control of competition law decisions concerns the question of the scope or intensity of judicial review (Vesterdorf, 2005; Schwarze, 2004; de la Torre, Fournier, 2017). Should a competent court conduct a full review of the contested decision, including an extensive evaluation of all the facts and evidence of the case, new evidence and economic evidence, or should the scope of judicial review be limited to the control of the legality of the contested decision only?

Different European countries have adopted different models of judicial review of competition authorities' decisions. For example, in Germany, competent courts conduct full review of all facts and evidence (Wise, 2005;

¹⁷ Article 67(1) of the 2009 CA.

¹⁸ *Ibidem*.

¹⁹ Articles 57 and 58 of the Administrative Disputes Act.

Terhechte, 2011); in a large number of other European countries, particularly in those countries where administrative courts decide on appeals against competition agency's decisions, courts are obliged to conduct the so-called 'control of legality' of competition authorities' decision (Gajin, 2019; Galewska, 2014; Fatur, Podobnik, Vlahek, 2016; Pecotic Kaufman, Butorac Malnar, Akšamovic, 2019; Rea, 2020; Svetlicinii, 2019). This means that in the review procedure courts will only check whether a competition authority violated parties' procedural rights or whether there was a manifest violation of any other legal rule. The court will not conduct 'de novo' proceeding and it will not re-examine all the facts and evidence from the beginning.

With regard to the scope of judicial review in competition cases in Croatia, until 2012 courts were only conducting a 'control of legality' without going into a deeper evaluation of the facts and evidence. This type of control was rather superficial and definitely insufficient.

Following the 2012 administrative justice reform, the powers of the administrative courts in the Republic of Croatia, including the powers of the HACRC, have been significantly broadened.

After 2012, the HACRC became entitled to conduct a full review (or unlimited review) of administrative decisions including, but not limited to, decisions brought by the CCA.

Moreover, administrative courts and the HACRC became obliged to conduct an oral hearing with the possibility to decide on the merits of the case.

However, those general powers of the HACRC, with regard to the scope of judicial review in competition cases, are subject to limitations prescribed by the 2009 CA. According to Article 68 of the 2009 CA, in the proceedings before the HACRC, judges were supposed to debate and decide on the basis of the facts presented in evidence during the proceedings²⁰. Moreover, plaintiffs could not present new facts before the HACRC. He/she could only propose new evidence relating to the facts that had been presented as evidence during the proceedings²¹. A plaintiff was entitled to present new facts before the HACRC under the condition that the plaintiff could prove that s/he had not had or could not have had knowledge of these facts during the proceedings before the CCA²².

This regulatory solution significantly narrowed the scope and the intensity of judicial review before the HACRC. Consequently, instead of conducting an extensive appraisal of all the facts and evidence before the HACRC, including the examination of new evidence which could be crucial for the final outcome of the court proceedings, the 2009 CA introduced a hybrid model of judicial

²⁰ Article 68(1) of the 2009 CA.

²¹ Article 68(2) of the 2009 CA.

²² Article 68(3) of the 2009 CA.

review which is still very much resembling the abandoned model of the ‘control of legality’ of CCA decisions. This choice was interesting since the ‘control of legality’ model had been changed mostly due to it being considered ineffective.

The weakness of this legal solutions should be further considered because a party dissatisfied with a HACRC judgment has only a limited right to a further recourse (Pecotic Kaufman, Butorac Malnar and Aksamovic, 2019, p. 215). The only legal remedy against a HACRC judgment is to request an extraordinary examination of the final judgment, which is an extraordinary legal remedy regulated by the Law on Administrative Disputes (Pecotic Kaufman, Butorac Malnar and Aksamovic, 2019, p. 215).

3. Legal remedies against HACRC decisions

As mentioned earlier, the parties to the proceedings initiated before the HACRC cannot appeal a judgment brought by the HACRC. However, parties to the proceedings brought before the HACRC may, due to a violation of the law, propose to the State Attorney’s Office of the Republic of Croatia to file a request with the Supreme Court of the Republic of Croatia for an extraordinary examination of the legality of the final decisions made by the High Administrative Court²³. So, only the State Attorney’s Office, which has a broad discretionary power to decide on such request, can on behalf of the parties to the proceedings request a review of a HACRC judgment. If the State Attorney’s Office finds that the request is well grounded, it will forward the request to the Supreme Court of Republic of Croatia. Likewise, the State Attorney’s Office of the Republic of Croatia can, without the obligation to explain its decision, reject the parties’ request. If the Supreme Court of the Republic of Croatia adopts the request, it may annul the judgment and remand the case for a new decision, or reverse the judgment²⁴.

Since 2012, when the new model of judicial review of competition law decisions was introduced, the State Attorney’s Office of the Republic of Croatia has received only one request for an extraordinary examination of the legality of a final decision of the HACRC²⁵. This request was sent to the Supreme Court; however, 8 years thereafter, the Supreme Court has still not decided on that case. The decision of the Supreme Court is being awaited with interest. Once the decision is rendered, it will be the first Supreme Court’s decision in relation to competition matters in Croatia.

²³ Article 78(1) of the Law on Administrative Disputes.

²⁴ Article 78(4) of the Law on Administrative Disputes.

²⁵ The request was made by the CCA against the HACRC judgment in the so-called Orthodontists cartel case (Judgment of the HACRC of 5 March 2015, UsII-70/14-6).

However, in the last five or six years, the HACRC has delivered numerous judgments against CCA decisions. These judgments represent valuable material for academic research and to draw conclusions about general trends and the efficiency of judicial control of CCA decisions.

IV. Judicial activity before the HACRC in competition cases with special emphasis upon successful and unsuccessful claims before the High Administrative Court

Since 1995 and the enactment of the first CA, decisions of the CCA and of the Administrative Court are published in the National Gazette. Since 2003 and the enactment of the 2003 CA, decisions of the HACRC are also published on the website of the CCA²⁶. This commendable practice ensured transparency of the work of the CCA as well as transparency of judicial control of CCA decisions. It has also significantly facilitated the research of past and current trends with regard to judicial activity in competition cases in Croatia. Based on the data published on the CCA website, in the following chapters, the author presents the results of research aimed at answering the following questions:

1. What is the average appeal ratio of CCA decisions?
2. What is the average number of successful and unsuccessful appeals?
3. Which are the most common types of CCA decisions that are subject to an appeal?
4. Which are the most successful and the most unsuccessful appeal arguments brought before the HACRC?

This is subject to the analysis of all CCA decisions appealed in the five-year period from 2014 until 1.1.2020²⁷.

²⁶ See: <http://www.aztn.hr/> (11.5.2020).

²⁷ Subject to analysis are only cases which relate to cartels, prohibited agreements, abuse of a dominant position and concentrations. To clarify, besides the decisions which relate to these types of infringements, the CCA also gives expert opinions at the request of the Croatian Parliament or the Government of the Republic of Croatia or other central administration authorities. Moreover, since 2017, based on the Act on the prohibition of unfair trading practices in the business-to-business food supply chain (OG 117/17), it also decides on unfair trading practices. Those opinions and decisions are also published on the CCA web site, but they are not included in this research and presented data.

1. Number of decisions brought by the CCA and the average appeal ratio (2014–2020)

In the five-year period of time from 2014 until January 2020, the CCA brought a total of 322 decisions related to competition law enforcement; out of them, plaintiffs brought a total of 82 claims before the HACRC. This leads to the conclusion that approximately 25% of all CCA decisions are subject to an appeal.

Table 1 shows the number of decisions brought by the CCA and the total number of claims against those decisions on an annual basis.

Table 1.

Year	CCA decisions per year	Number of claims per year	Number of appealed decisions in %
2014	52	13	25
2015	86	39	45.3
2016	67	15	22.3
2017	41	6	14.6
2018	32	4	12.5
2019 (until 1 January 2020)	44	5	11.4
TOTAL NUMBER	322	82	25.46

2. Number of successful and unsuccessful claims before the HACRC

Table 2 shows the number of successful and unsuccessful claims brought before the HACRC. Note that out of the aforementioned 82 claims, 14 claims were successful, while 63 claims were dismissed. There were 5 (other) decisions where the HACRC dismissed the action (lawsuit) as incomplete or as lacking in jurisdiction²⁸. A little more than 17% of the successful claims, compared to almost 77% of unsuccessful claims, shows that the chance to win a case before the HACRC against the CCA is pretty low. The reasons for the low success rate are difficult to detect, but we can assume that they include unfounded claims, poor or insufficient evidence and others.

²⁸ In this case, the HACRC delivered its decision based on the rules prescribed by Article 29 and 30 of the Law on Administrative disputes.

Table 2.

Year	Number of claims per year	Number of successful claims per year	Number of unsuccessful claim per year	Other
2014	13	4	9	0
2015	39	4	31	4
2016	15	3	12	0
2017	6	0	6	0
2018	4	3	0	1
2019	5	0	5	0
Total	82	14	63	5
Total % of successful and unsuccessful claims from 2014 – 1 January 2020		17.07% successful claims	76.82% unsuccessful claims	Other types of decision

3. Types of CCA decisions that were most frequently subject to appeals

Table 3 and 4 show the most frequently appealed decisions and the success ratio regarding those claims.

Table 3 shows that there are six types of CCA decisions that were most frequently challenged. These include decisions dismissing an initiative, terminating proceedings, prohibiting an agreement or a cartel, abusing a dominant position, fining for failing to notify a merger and rejecting a request for the reinstatement of the proceedings.

Out of the 82 claims (see table 1 and 2), 29 claims concerned a decision of the CAA to dismiss an initiative. Most of these cases related to a situation where a claimant was requesting from the CCA to open an *ex officio* investigation of an alleged abuse of a dominant position against a certain undertaking, where CCA rejected such a request.

The second most challenged decision of the CCA concerned cases related to the existence of a prohibited agreement or a cartel agreement. Out of the 82 decisions, 17 claims were brought against CCA decisions dealing with infringements of competitions rules related to the existence of a prohibited agreement (cartel agreement) and the level of the fine.

The third most challenged type of CCA decisions is the decision to reject a request for reinstating the proceedings. However, it is noticeable that 12 claims were brought in 2015, whilst there was only one such claim in 2017.

All the twelve claims mentioned above were submitted by the same claimant, which makes the analysed data almost irrelevant.

However, with regard to the data in table 3, it is worth mentioning that only two claims are related to CCA decisions regarding abuse of a dominant position. If we translate this number into a real life situation, it means that the CCA conducted only two proceedings for abuse of a dominant position in a five-year period, which seems an absolutely unrealistic scenario and leads to one of two following possibilities: either in Croatia abuse of a dominant position is not a widespread practice or the CCA has not been researching and thus detecting this conduct. Since it is hard to believe that Croatian undertakings are restraining themselves from abusing their dominance, it appears that it is more likely that the CCA has been insufficiently researching the abusive behaviours of dominant undertakings.

Furthermore, it should be emphasized that only two decisions relate to mergers, and both are in connection to a CCA decision to impose a fine for failing to notify a merger. The significant point in this matter is that both claims were brought in 2014 when Croatian undertakings were still largely unaware of the possibility of being fined for failing to notify mergers. Since no infringement for the same offence was registered after 2014, we may assume that the CCA's fining policy regarding the failure to notify mergers has achieved the desired deterrent effect.

Table 3.

Type of appealed CCA decision \ Year	Decision to dismiss initiative	Decision on the termination of the proceedings	Decision on the prohibited agreement – cartel	Decision on the abuse of dominant position	Decision on fine for failing to notify merger	Decision on rejection of the request for reinstatement of the proceedings
2014	7	1	2	1	2	0
2015	11	2	3	1	0	12
2016	3	0	10	0	0	0
2017	2	0	1	0	0	1
2018	1	0	1	0	0	0
2019	5	0	0	0	0	0
82 appealed decision	29	3	17	2	2	13

4. The most successful and unsuccessful claims before the HACRC

Although every competition case is fact specific, the analysis of the case-law provides useful information on the likelihood of success of the arguments on appeal and it may reduce the risks associated with the decision of whether to engage into competition law litigation or not. Having this in mind, the data provided in table 4 below intended to show the general success ratio with regard to particular claims raised before the HACRC. In other words, table 4 will show whether an appeal is more likely to succeed with some claims in comparison to others.

Table 4 also suggests that all parties who were contesting CCA decisions on the termination of proceedings succeeded with their claims. There were three such claims and all of them proved successful.

Moreover, a quite high success ratio is noticeable with regard to the two decisions on an abuse of a dominant position and in a merger. In both cases, the general success ratio is 50%. However, we cannot consider this information too relevant since the statistical sample was too small for definite conclusions.

Probably the most relevant information of the entire research concerns claims regarding prohibited agreements (cartels). Out of the 17 claims against CCA decisions on prohibited agreements (cartels), the HACRC uphold the claimants in six of these cases, which makes the success ratio in cartel cases around 35%. This is quite a high ratio, comparable to the success rate of cases brought before EU courts. According to the study by Paemen and Blondeel, the success ratio in cartel cases before the GC is around 40% (Paemen and Blondeel, 2017, p. 173–174).

This information should also be considered from different stand points. Firstly, it signals that there is a chance to win a cartel case before the HACRC. Secondly, it shows that the CCA's estimations and evaluations are not irrefutable. Lastly, regardless of the criticism that may exist on particular decisions, and generally on the judicial control of CCA decisions by the HACRC, these figures show that the HACRC is investing time and effort in resolving these issues and is making progress.

Table 4.

Type of appealed decision	Decision to dismiss initiative	Decision on the termination of the proceedings	Decision on the prohibited agreement – cartel	Decision on the abuse of dominant position	Decision on fine for failing to notify merger	Decision on rejection of the request for reinstatement of the proceedings
Total (number of claims)	29	3	17	2	2	13
Successful claims	2	3	6	1	1	0
Unsuccessful claims	27	0	11	1	1	13
Successful claims in (%)	8%	100%	35.3%	50%	50%	0

V. Conclusion

Twenty-five years seems the right time to evaluate the achievements and failures during the time of the creation of a complex system of competition law rules in Croatia. Meanwhile, a predictable legal framework of competition law rules has been established. In that sense, legal experiments associated with finding the right model of administrative procedure and judicial control of competition law decisions is behind us. Therefore, regardless of criticism with regard to some existing legal solutions, the current model of judicial review ensures at least a minimum standard of legal protection guarantees and due process.

However, in order to improve the quality of judicial review in competition law, changes would be welcome with regard to some aspects of judicial review. Firstly, rules on the scope of judicial review and the evaluation of evidence should be re-examined. The HACRC should conduct a full review of all the evidence and facts, and its review should not be limited solely to the facts established in the administrative procedure before the CCA.

Moreover, the current model of judicial review of the HACRC judgments by the Supreme Court should be improved further. The existing model of judicial control of HACRC judgments is too rigid and seriously limits potential claimants' rights to access the second instance court.

With regard to research data on the scope and intensity of judicial review before the HACRC, this data may be used only for some rather general

conclusions. It is noticeable that the average success rate in competition cases is rather low. Overall success rate below 20% may signal that some aspects of judicial review are inefficient. Therefore, a more detailed analysis of every single decision should be made in order to detect the causes of the problem, if any exist.

Furthermore, some of the data presented are, due to a too small number of cases (samples), insufficient for drawing any relevant conclusions. This relates particularly to CCA decisions on abuse of a dominant position and mergers.

Lastly, as it has already been mentioned in this article, probably the most relevant information of the whole research concerns the success rate in cartel cases (or prohibited agreements). Although this data should be taken with a certain amount of scepticism, but it should not be fully disregarded. A success rate above 35% gives plaintiffs a cause for satisfaction. It sends the message that the HACRC is willing to hear their arguments, to analyse them and that the HACRC is not taking CCA's findings for granted.

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