Class: UP/I 034-03/18-01/009

Reg.no: 580-09/84-2018-003

Zagreb, 14 November 2018

CCA vs. KOIOS savjetovanje d.o.o., Zagreb

- Initiative relating to the alleged distortion of competition

Decision: Initiative dismissed due to lack of standing to act

Case summary:

Upon the complaint filed by the undertaking BILOG d.o.o. from Zagreb the Croatian Competition Agency (CCA) assessed the agreement entered into between the undertakings BILOG and KOIOS that contained a no-poach clause. Under the No-poaching Agreement concerned both parties agreed not to poach, solicitate or invite to hire employees indirectly, through third parties, neither natural nor legal persons, regardless of the legal connectedness with the third parties concerned, or in any way encourage the employees of the other party that they have established contacts with during the implementation of the Agreement to leave their jobs at the other party without a prior written approval.

In the sense of competition rules, the no-poaching provisions have a similar effect as the non-compete provisions. Therefore, they should be assessed in the similar way.

Taking into consideration the nature of the provisions of the Agreement in question, the objectives it aims to achieve and the economic and legal context, the CCA found that the restriction concerned under Article 14 of the No-poaching agreement is directly linked with the implementation of the Agreement and the provision of the IT and consultancy services.

It must be noted that the no-poach restriction included only the employees of the other party that the complainant and KOIOS established contacts with in the course of the implementation of the Agreement, and not all the employees of the other party.

Both the complainant and the undertaking KOIOS are active in the provision of IT services, where demand is high and supply limited in terms of labour force. At the same time, the relevant market concerned shows high daily fluctuations of the labour force switching from one employer providing the same services to another. Job-hopping is present on the basis of the labour agreement, cooperation agreements or temporary arrangements with natural persons who provide these services.

In this concrete case, and taking into account the agreed way in which the services are provided by KOIOS to the complainant, the nature of the services specified under the Agreement, the service providers and the nature of the functioning of the market concerned, there is a risk that the Agreement in question could not be implemented or continued, if the complainant or KOIOS would poach, solicit or encourage to hire employees, or in any way encourage the employees that they established contacts with in the course of the implementation of the Agreement, to quit their job at the other party to the agreement, without a prior written approval of the other party to the agreement.

In line with Article 74 of the Croatian Competition Act, in the case of legal voids and uncertainties relating to the interpretation of competition rules, the CCA accordingly applies the criteria arising from the application of the competition rules applicable in the European Union, and particularly the references to the case law of the Court of Justice of the European Union.

That being said, the CCA found that the Agreement entered into between the undertakings BILOG and KOIOS that contained a no-poach clause in Article 14 thereof represents an ancillary restriction of competition – a restriction which is closely connected, objectively necessary for the main operation and proportionate to the underlying objectives of that operation. In this particular case, the five major parts of the Agreement were not relating to their objective and effect anticompetitive. Consequently, the clause in question could not be found restrictive and as such prohibited in the sense of Article 8 paragraph 1 of the Competition Act.