Competition Issues in the Croatian Seaport Sector Regarding the Provision of Nautical Tourism Services

by

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Abstract

In the last decade, services in nautical tourism in the Republic of Croatia have been provided not only in marinas and other facilities intended for nautical tourism by the relevant domestic regulations, but also in other types of ports, such as public ports and sports club ports. Although marinas and public ports provide the same services i.e., berthing services for nautical tourism vessels, different corporate tax regimes apply to these two types of seaports. The first part of the paper gives an overview of the legal rules regulating seaports in Croatia. Subsequently, the competitive positions of marinas and public ports on the market of nautical tourism services in Croatia are examined. In this context, the case law of the Court of Justice of the EU on undertakings and State aids in the form of corporate tax advantages granted to port authorities is outlined. In addition, past enforcement of competition rules in the Croatian nautical tourism sector is analysed. Finally, *de lege ferenda* proposals are submitted, which might, in the author's view, contribute to the creation of a level playing field for port operators providing nautical tourism services in Croatia.

Resumé

Au cours de la dernière décennie, les services de tourisme nautique en République de Croatie ont été fournis non seulement dans les marinas et autres installations destinées au tourisme nautique par la réglementation nationale pertinente, mais aussi dans d'autres types de ports, tels que les ports publics et les ports de clubs sportifs. Bien que les marinas et les ports publics fournissent les mêmes services, c'est-à-dire des services d'accostage pour les navires de tourisme nautique, des régimes d'imposition des sociétés différents s'appliquent à ces deux types de ports maritimes. La première partie de l'article donne un aperçu des règles juridiques régissant les ports maritimes en Croatie. Ensuite, les positions concurrentielles des marinas et des ports publics sur le marché des services de tourisme nautique en Croatie sont examinées. Dans ce contexte, la jurisprudence de la Cour de justice de l'UE sur les entreprises et les aides d'État sous forme d'avantages fiscaux accordés aux autorités portuaires est commentée. En outre, l'application des règles de concurrence dans le secteur du tourisme nautique croate est analysée. Enfin, des propositions *de lege ferenda* sont soumises, qui pourraient, selon l'auteur, contribuer

à la création d'un terrain de jeu équitable pour les opérateurs portuaires fournissant des services de tourisme nautique en Croatie.

Key words: competition; nautical tourism sector; ports open for public traffic; facilities intended for nautical tourism; marinas cartels; corporate tax exemption; Croatia.

JEL: K21, K34

I. Introduction

Nautical tourism is defined as sailing and stay of tourists (boaters or passengers) on nautical tourism vessels (yachts and other pleasure craft) intended for personal needs or an economic activity, as well as stay in marinas and in other facilities intended for nautical tourism and in the nautical part of ports open to public traffic, aimed at providing rest, recreation and cruises.[1] In the last three decades, there has been increased interest in nautical tourism along the Croatian coast. Due to the increasing demand, especially in the last decade, services in nautical tourism, particularly berthing of nautical tourism vessels in Croatia, are rendered not only in marinas , which are special purpose ports intended for nautical tourism, but also in other types of ports, such as ports open for public traffic (public ports) and sports club ports. However, under current regulations, this is explicitly forbidden in some types of ports. In this regard, it should be noted that pursuant to the Maritime Domain and Seaports Act (hereinafter: MDSA),[2] berths in sports club ports are not intended for nautical tourism vessels, but exclusively for pleasure craft owned by members of non-profit sports associations (clubs), which operate these ports on the basis of a granted concession (Panžić, 2010). This article focuses on the analysis of the competition between public ports and facilities intended for nautical tourism, marinas in particular on the market of services in nautical tourism in Croatia.

As regards Croatian seaports open for public traffic, operated by public-law entities – port authorities, the Ordinance on Ports Open for Public Traffic of County and Local Importance (hereinafter: OCDPPRLI)[3] allows for the

[1] See Article 84 of the Tourism Services Act, Official Gazette of the Republic of Croatia, 130/2017, 25/2019, 98/2019, 42/2020.

[2] See Article 81 of the Maritime Domain and Seaports Act, Official Gazette of the Republic of Croatia, no. 158/2003, 100/2004, 141/2006, 38/2009, 123/2001, 56/2016, 98/2019.

[3] It is a statutory instrument of the MDSA. Its full title is Ordinance on the Criteria for Designating the Purpose of the Port Areas in the County and Local Ports Open to Public

provision of services in nautical tourism in ports open for public traffic of county and local significance exceptionally, only in what is known as the 'nautical part' of the port.

Notwithstanding the above, in practice, nautical tourism services, mainly berthing services for nautical tourism vessels, are frequently offered in all types of ports open for public traffic in Croatia, even in those of special (international) economic importance for Croatia.[4] In other words, port authorities operating ports open for public traffic rent out the public maritime domain to private users for berthing yachts and other pleasure craft. It should be pointed out that regulations in force neither prohibit nor allow the provision of berthing services to yachts and other pleasure craft in ports open for public traffic of special (international) economic importance for Croatia.

This indicates that the legal aspects of the provision of nautical tourism services in Croatia are not adequately regulated, and the enforcement of the applicable rules is also unsatisfactory.

II. Overview of the domestic law on seaports and the maritime domain

1. Division of Croatian seaports pursuant to the MDSA

The main piece of legislation regulating ports and the public maritime domain in Croatia is the MDSA and its sub-laws. In addition, some provisions on ports are contained in the Maritime Code.[5] It should be emphasised that pursuant to Article 3(3) MDSA, the entire Croatian shore and all ports are under the legal regime of a common or public maritime domain. As the maritime domain has the legal status of *res extra commertium* and *res communes omnium* (Bolanča, 2003; Rak and Vio, 2015), the MDSA prescribes that it may be used and economically exploited only on the basis of concession[6]

Traffic, Methods of Payment of Berthing Fees, Terms of Use, the Maximum Port Dues and Allocation of Port Authority Revenues, Official Gazette of the Republic of Croatia, no. 94/2007, 78/2008, 114/2012 and 47/2013.

[4] Pursuant to Article 4 of the Ordinance on the Classification of Seaports Open for Public Traffic and special Purpose Ports (Official Gazette of the Republic of Croatia, 110/2004, 18/2007), ports of special (international) economic importance for Croatia are ports with the highest traffic.

[5] See, Part III, Chapter III of the Maritime Code. See, Official Gazette of the Republic of Croatia, no. 181/2004, 76/2007, 146/2008, 61/2011, 56/2013, 26/2015, 17/2019.

[6] See Articles 6(5) and 7(1) MDSA.

or concession approval.[7] The general rules on the award of concessions are provided for in the Concession Act (Tuhtan Grgić, Bulum and Petit Lavall, 2019, p. 499).[8] A concession for the economic exploitation of the maritime domain is granted through a public tender(Article 17(1) MDSA). The concessionaire who is awarded a contract must use the maritime domain in compliance with the concession-granting decision and the concession contract signed between the concession grantor and the concessionaire (Tuhtan Grgić and Bulum, 2018, pp. 299–307).

Pursuant to the relevant regulations, Croatian ports are classified according to their purpose, and by their size and importance for Croatia. The main classification (from Article 40 MDSA) distinguishes ports according to their purpose as ports open for public traffic (public ports) or special purpose ports. Seaports which may be used by everybody under the same conditions in accordance with their purpose, and within the limits of available capacity, are ports open for public traffic, while special purpose ports are seaports which are of particular use[9] or economic use of private persons (such as nautical tourism ports, fishing ports, industrial ports, shipbuilding ports, etc.) or a governmental body (navy ports).

Considering their size and importance for Croatia, ports open for public traffic are further subdivided into ports of special (international) economic importance, ports of county importance and ports of local significance.

Apart from that, there are also two further subdivisions of special purpose ports. Firstly, special purpose ports may be open for international traffic or only for national traffic (Article 40(1) MDSPA). Secondly, considering their importance for Croatia, special purpose ports are divided into ports of national importance and ports of county relevance. The importance of a special purpose port is estimated exclusively on the basis of the number of berths (Tuhtan Grgić, 2016).[10] Consequently, concessions will be awarded by a different State body and for a different period of time, depending on the economic importance of special purpose ports.

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[7] A concession approval is an act by virtue of which a maritime domain is given to use to natural and legal persons in order to carry out the activities that neither exclude nor restrict the general use of the maritime domain (Article 7(2) MDSA). For example, a concession approval may be awarded for selling souvenirs on the beach.

[8] See Concession Act, Official Gazette of the Republic of Croatia, no. 69/2017, 107/2020.

[9] Particular use is use that is not a general one nor a commercial exploitation of the maritime domain (Article 6(4) MDSA). For example, use of maritime domain for the construction of navy ports.

[10] Such division is criticised by some scholars and practitioners who consider that additional criteria should be added. In the case of nautical tourism ports, the size of the vessels that may be berthed in a nautical tourism port and the quality and quantity of accompanying services should be added in order to estimate the economic importance of a particular port.

2. Legal regulation of the provision of services in nautical tourism in marinas and in other facilities intended for nautical tourism

The Ordinance on the Categorization of Nautical Tourism Port and Classification of other Facilities Intended for the Provision of Services and Accommodation of Vessels (hereinafter: OCNTPCF), is a sub-law passed by the Ministry of Tourism on the basis of the Tourism Services Act. The ordinance identifies different categories of facilities intended for nautical tourism according to the types of objects and services rendered.[11] Only a marina is classified as nautical tourism port. Pursuant to Article 5 OCNTPCF, other facilities, intended for the provision of berthing services and accommodation of vessels, are nautical anchorage, nautical mooring, boat storage and dry marina (hereinafter: other facilities intended for nautical tourism). Marinas are defined as parts of the water area and of the shore specially constructed and fitted for the provision of moorings, accommodation of tourists on vessels and other nautical tourism services (Article 7 OCNTPCF). These ports are the most complex type of facility intended for nautical tourism, which offers services in nautical tourism of the highest level of quality. Marinas are commercially the most important type of nautical tourism facilities also because they, compared to other facilities, generate the highest revenues (Luković et al., 2015, p. 164).

3. Legal regulation of the provision of nautical tourism services in ports open for public traffic of county and local importance *de lege lata* and the state of affairs

As discussed above, regulations in force neither prohibit nor allow the provision of berthing service to yachts and other pleasure craft in ports open for public traffic of special (international) economic importance for Croatia.[12] It is a legal gap that allows for different interpretations by the port authorities operating these seaports. Consequently, berthing services for nautical tourism vessels has been increasingly provided in these public seaports.

As regards ports open for public traffic of county and local importance, the port area of these ports is divided into the operative, the communal and, space permitting and provided there is a need for it, the nautical part of the port (Article 3 OCDPPRLI). The nautical part of the port open for public traffic of county and local importance is intended for the berthing of nautical tourism vessels.

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[11] Official Gazette of the Republic of Croatia, 120/2019.

[12] See section I.

Pursuant to Article 2(5) OCDPPRLI, in the nautical part of a port, only daily or transit berths for nautical tourism vessels may be assigned during the nautical season, but not long-term or permanent berths, which are assigned for at least a month.

The rationale behind this provision was to prescribe that the provision of berthing services for nautical tourism vessels in ports open for public traffic of county and local significance would be allowed exceptionally (for example, at the peak of the nautical season, when all the berths in nautical tourism ports in the pertinent area have already been rented out) and only for a short period of time as daily or transit berths. Additionally, wintering of nautical tourism vessels, which is defined as staying in a port out of the nautical season, is also only allowed in the nautical part of the port open for public traffic of county and local importance (Article 9 OCDPPRLI).

The operative part of a port is intended for the berthing of vessels carrying maritime coastal line traffic in Croatia, and vessels that perform the occasional carriage of passengers, as well as for the mooring of cargo and fishing vessels during the loading or unloading of cargo.

The communal parts of these ports are used on the basis of long-term or permanent berth contracts. The priority of assignment of a berth is given to: first, owners of vessels with permanent residence in the area of the pertinent unit of local/regional self-government and where the vessel is locally registered for carrying out economic activities, in particular carriage of passengers and fisheries; second, owners of locally registered pleasure craft with permanent residence in the area of the pertinent unit of local/regional self-government; and, finally, owners of vessels which predominantly reside in that area and that are locally registered (Article 5 OCDPPRLI).

Berthing services for nautical tourism vessels in the communal parts of ports open for public traffic (also known as communal berths) are offered at considerably lower prices than the same services provided in the nautical parts of these ports (also known as nautical berths) and in nautical tourism ports; this approach is used in order to ensure mobility of the local inhabitants, for whom they are primarily intended. In practice, however, the applicable rules are circumvented because communal berths tend to also get assigned by the competent port authorities to charter vessels on the basis of a contract of permanent berth, which is not in accordance with the rules in force nor with the purpose of communal berths (Pijaca, Padovan, 2018, p. 318.) intended for the mooring of vessels owned by local inhabitants, or vessels which predominantly reside in that area and which are locally registered. This indicates that there are problems when it comes to the enforcement of the applicable rules on the provision of services in nautical tourism in ports open for public traffic.

III. Business practice of the provision of nautical tourism service in Croatian ports

Marinas and other facilities intended for nautical tourism are also tourist facilities in which, in addition to berthing,[13] various accompanying services are provided to yachts and other pleasure craft, their owners, users and crews, such as: lease of vessels with or without crew; accommodation; safeguarding and maintenance of vessels at berth, in the sea, and in dry dock; equipping and preparing of vessels; recreational services (such as organizing package excursions or excursions in nautical tourism vessels); and other services that boaters need.[14]

These accompanying services, as a rule, are not provided in ports open for public traffic. Pursuant to the OCDPPRLI (Article 8), in the nautical part of ports open for public traffic of county and local significance, apart from berthing services, waste disposal, electricity and water supply services, other services that raise the quality of the port service as a whole may be provided on the basis of concession contracts. In practice, in ports open for public traffic, besides berthing services for nautical tourism vessels, provided by port authority employees, only waste disposal, electricity and water supply services are provided on the basis of the concession. In addition, the services of performing repair works on vessels are offered by external service providers, which are authorised by the port authority to provide these services.

As regards the safety of the berth, it should be noted that according to the general terms and conditions and standard contract forms used in Croatian marinas, it is an obligation of a marina to provide a technically sound and nautically safe berth appropriate for the specific vessel with respect to the type, size, engine and other technical specifications of the vessel, and to maintain it for the entire duration of the contract (Skorupan Wolff et al., 2017). This obligation includes the duty of the marina to employ a sufficient number of qualified staff trained for work related to the maintenance and supervision of berths. Furthermore, in practice, most marina operators provide monitoring services of vessels on berth. Marinas perform this duty by observing the previously agreed protocols of periodical external examination of vessels. Marina operators usually

[13] According to data published by the Croatian Bureau of Statistics berthing services still generate 73,7% of the total income realised in nautical tourism ports. Croatian Bureau of Statistics, *Nautical tourism: capacity and turnover of ports* 2020, First Release No 4.3.4 (9 April 2021), available at: https://www.dzs.hr/Hrv_Eng/publication/2020/04-03-04_01_2020.htm (accessed on 23.7.2021). In order to increase the income from accompanying services, investments in these ports are necessary. See (Tuhtan Grgić, 2016, p. 274).

[14] See Article 85 of the Tourism Services Act.

apply a contract model that does not include the marina operator's obligation of custody of the vessels (Pijaca and Padovan, 2018, p. 322).

By contrast, port authorities in ports open for public traffic do not undertake to provide the above-mentioned services of monitoring vessels on berth. As a consequence, the safety level of the berth of nautical tourism vessels is higher in marinas than in ports open for public traffic. Furthermore, such obligation is not prescribed by the rules of the OCDPPRLI applicable to the provision of berthing services for nautical services vessels in ports open for public traffic. The reason for this lies in the fact that these ports are not originally intended for the provision of berthing services for nautical tourism vessels. However, ports open for public traffic have provided services in nautical tourism for more than a decade. This is evidence to the fact that current legal regulations are not following the changes in the business practice of seaports in Croatia.

In Croatian marinas, berthing services for nautical tourism vessels may be offered on the basis of a permanent berth contract or transit berth contract.[15] Permanent berth contracts last at least a month. In the business practice of Croatian port, these contracts are always made in writing and are usually concluded for an annual or semi-annual period. Transit berth contracts are short-term contracts which, as a rule, are not made in writing.

As explained above, pursuant to Article 2(5) OCDPPRLI, in ports open for public traffic of county or local importance, berthing services for nautical tourism vessels may be offered only on the basis of a transit berth contract and exclusively in the nautical part of the port. Yet, port authorities in all types of ports open for public traffic violate the above rule and offer berthing services for nautical tourism vessels on the basis of permanent berth contracts and also in the communal part of the ports open for public traffic of county and local importance.

IV. Competitive positions of different type of seaports on the market of services in nautical tourism in Croatia

1. Croatian nautical tourism sector: capacity, turnover, and attitudes of consumers

There are 185 facilities intended for nautical tourism on the Croatian coast including: 82 marinas, 79 anchorages, 11 moorings and 13 boat storages. The total number of berths in those facilities in 2020 was 18 625. There were

[15] The contract of nautical berth is regulated in the Croatian Maritime Code. See Articles 673j – 673v of the Croatian Maritime Code.

14 312 vessels permanently moored in marinas and in other facilities intended for nautical tourism; 121 536 vessels were in transit. The total income realised in marinas and in other nautical tourism facilities in 2020 amounted to about 812 million HRK (approx. EURO 107 million), of which around 73.7% came from renting out berths.[16]

As regards ports open for public traffic, it should be noted that there is no official data on the number of nautical tourism vessels moored in Croatian ports open for public traffic, but only on the number of berths available in these ports. The latest official data published by the Ministry of Maritime Affairs, Transport and Infrastructure relates to 2017. That year, there were 24 676 berths in ports open for public traffic, of which 2 405 were nautical berths (Ercegovac, 2018).

The Croatian Institute for Tourism conducted a survey in 2018 on the attitudes and expenditures of boaters in Croatia (Marušić et al., 2018). The survey included 1,666 respondents from 14 generating markets, from July to October 2017, in 25 marinas and 8 ports open for public traffic along the Croatian coast and on the islands. The data was collected through personal interviews. According to the survey, 10 overnights were realised on average during one trip with a nautical tourism vessel; of those, 6 overnights were spent in marinas, 2 overnights in ports open for public traffic, and 2 overnights on corpo-morto and/or moorings outside marinas/ports (other facilities intended for nautical tourism).

This survey shows that boaters frequently choose ports open for public traffic for their vessels' accommodation during their stay in Croatia, although, as previously explained, the safety level of the berth in marinas is higher than in ports open for public traffic.[17] In addition, marinas offer various accompanying services which are not provided in ports open for public traffic. On the other hand, the prices of berthing services provided in ports open for public traffic are several times lower than prices of berthing services in marinas. Accordingly, marinas and other facilities intended for nautical tourism and ports open for public traffic are competitors on the market of nautical tourism services in Croatia.

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[16] Croatian Bureau of Statistics, *Nautical tourism: capacity and turnover of ports* 2020, First Release No 4.3.4 (9 April 2021), available at: https://www.dzs.hr/Hrv_Eng/publication/2020/04-03-04_01_2020.htm (accessed on 23.7.2021).

[17] See section III above.

2. Classification of port authorities as undertakings according to the case law of EU Courts

According to settled case law of the Court of Justice of the EU 'the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed'.[18] Therefore, the classification of a particular entity as an undertaking depends exclusively on the nature of its activities. Pursuant to the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (hereinafter: TFEU), this principle has three consequences[19] that are applicable also in State aid cases concerning port authorities that operate Croatian ports open for public traffic.

Firstly, the status of the entity under national law is not decisive. For example, an entity that is formally part of public administration under national law may, nevertheless, have to be regarded as an undertaking within the meaning of Article 107(1) TFEU if it performs economic activities. Port authorities operating Croatian public seaports are public entities, established either by the Government of the Republic of Croatia or by the county assembly, for the purpose of managing, building and using ports open for public traffic. Pursuant to Article 48(5) MDSA, unless otherwise provided by that Act, rules governing institutions apply to port authorities. However, these entities additionally perform economic activities such as berthing of nautical tourism vessels (Bulum and Pijaca, 2020).[20]

Secondly, the application of State aid rules does not depend on whether the entity has a profit-making purpose – non-profit entities can also offer goods and services on a market.[21] Article 48(3) MDSA defines port authorities in Croatia as non-profit legal entities. In addition, pursuant to Article 66(1) MDSA, all port services in ports open for public transport may be provided only by

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[18] CJ judgment of 12.09.2000, Joined Cases C-180/98 to C-184/98 *Pavlov and Others*, ECLI:EU:C:2000:428, para. 74; CJ judgment of 10.01.2006, Case C-222/04 *Cassa di Risparmio di Firenze SpA and Others*, ECLI:EU: C:2006:8, para. 107; CJ judgement of 23.04.1991, Case C-41/90 *Höfner and Elser* v. *Macroton,* ECLI:EU:C:1991:161, para. 21.

[19] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ 2016 C 262/1), paras. 7–10 and 12. The Notice clarifies the Commission's understanding of Article 107(1) of the Treaty, as interpreted by the EU Courts.

[20] Recently, port authority staff has also started to provide mooring of vessels used in maritime costal liner traffic.

[21] ECJ judgment of 29.10.1980, Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck*, ECLI:EU:C:1980:248, para. 88; CJ judgment of 16.11.1995, Case C-244/94 *FFSA and Others*, ECLI:EU:C:1995:392, para. 21.

private operators on the basis of granted concessions.[22] Therefore, Croatia has chosen the landlord port management model for its ports, as defined in the World Bank Port Reform Toolkit (The World Bank, 2007). It means that port authorities do not provide port services. They have the role of a landlord, being responsible for managing the real estate within the port area, which includes long-term development of the land and the maintenance of basic port infrastructure. Hence, the current business practice of some ports open for public traffic in Croatia, where port authorities provide berthing services or rent out the maritime domain to private users for berthing of yachts and other pleasure craft and make profits therefrom, is not in accordance with the applicable national rules.

Thirdly, the classification of an entity as an undertaking is always made in relation to a specific activity. An entity that carries out both economic and non-economic activities will be regarded as an undertaking only with regard to the activities of an economic nature.[23] In this context, it should be pointed out that public authorities operating public seaports in Croatia besides the typical public authority functions (such as maritime traffic control, safety or anti-pollution surveillance, fire-fighting, police, customs, etc. that fall under the responsibility of the State in the exercise of its public powers, which are delegated to these bodies), also rent out port land and the associated sea area, seabed and subsoil (common or public maritime domain) to service providers and other users for a remuneration. According to the Commission, 'renting out the port land and basic infrastructure to private users against the payment of fees is an economic activity like renting out any other asset against payment.'[24] The General Court took the same view in cases concerning exemptions from corporate income tax of Belgian and French ports.[25] In its ruling regarding the French ports, the General Court referred to the Commission (Power, 2016) which established that 'a port should be considered as an undertaking if – and

[22] The exception is the provision of waste disposal, water and electricity services by port authorities in ports open for public traffic of local importance in the case when there is no interest of the private operator in the provision of these services (Article 78/2 MDSA).

[23] GC judgment of 12.12.2000, Case T-128/98 *Aéroports de Paris v. Commission*, ECLI:EU:T:2000:290, para. 108.

[24] Commission letter regarding the aid scheme SA.38399 (2019/C, ex 2018/E) – *Italy, Corporate Taxation of Ports in Italy*, C(2019) 8067 final, Brussels 15.11.2019, para. 48.

[25] See GC judgment of 20.09.2019, Case T-696/17 *Havenbedrijf Antwerpen NV and Maatschappij van de Brugse Zeehaven NV v. European Commission*, ECLI:EU: T:2019:652, para. 72; Commission Decision of 27.07.2017, Case 2017/2116 on aid scheme SA.38398 (2016/C, ex 2015/E) implemented by France – *Taxation of ports in France*, OJ L332, 14.12.2017, p. 24, para. 45 and GC judgment of 30.04.2019, Case T-747/17 *Union des Ports de France – UPF v. European Commission*, ECLI: EU: T:2019:271, para. 51.

to the extent that – it actually carries out one or more economic activities'.[26] Taking into consideration all of the above, Croatian port authorities should be considered undertakings with regard to the activities of renting berths for nautical tourism vessels according to the case law of EU Courts, within the meaning of Article 107(1) TFEU. Consequently, these entities are subject to competition law, including the State aid rules (Van Hooydonk, 2019, p. 526) with regard to the activities of renting out the maritime domain for berthing nautical tourism vessels. For that reason, corporate tax exemption awarded to the Croatian port authorities by the current domestic legislation will be analysed below.[27]

3. Corporate tax regime of Croatian ports

An important difference between Croatian ports open for public traffic and special purpose ports, as discussed above, also lies in the fact that in ports open for public traffic administrative and management functions are exercised by public-law entities, that is, port authorities; in marinas and in other facilities intended for nautical tourism, these functions are exercised by a single operator as a concessionaire, which is, as a rule, a commercial company. Consequently, different corporate tax regimes apply to these types of ports and facilities, although in some cases they provide the same services such as berthing of nautical tourism vessels.

Marina operators, as well as undertakings operating nautical tourism facilities, are taxpayers, and thus subject to corporate tax under national tax law. Corporate income tax in Croatia is regulated by the Corporate Income Tax Act (hereinafter: CITA).[28] Article 2 CITA lays down rules on taxable persons. Pursuant to the Article 2(6) CITA, State and county or local government institutions are exempt from corporate income tax. Consequently, port authorities in ports open for public traffic do not pay corporate tax. According to the Commission, 'the exemption from corporate tax is of a nature to constitute State aid only if it relates to income generated by economic activities'.[29] Hence, the corporate tax exemption granted to port

[26] See Commission Decision2017/2116 on aid scheme SA.38398 (2016/C, ex 2015/E) implemented by France, cit., para. 44; and GC judgment of 30.04.2019, *Union des Ports de France*, cit., paras. 52 and 64.

[27] On the corporate tax exemption as a form of State aid see (Bacon et al., 2013, p. 23).

[28] Official Gazette of the Republic of Croatia, no. 177/2004, 90/2005, 57/2006, 146/2008, 80/10, 22/2012, 148/2013, 143/2014, 50/2016, 115/2016, 106/2018, 121/2019, 32/2020, 138/2020.

[29] See Commission Decision 2017/2116 on aid scheme SA.38398 (2016/C, ex 2015/E) implemented by France, para. 44.

authorities operating Croatian ports open for public traffic with regard to income generated by the provision of berthing services or renting berths for nautical tourism vessels constitutes illegal State aid in accordance with the case law of the EU Courts and Commission's decisions.[30] For that reason, in our opinion, *de lege ferenda* all operators which provide berthing services for nautical tourism vessels in Croatia, including port authorities in public ports, should be subject to corporate income tax in relation to the revenues generated by the provision of berthing services for nautical tourism vessels, in order to prevent distortions of competition on the market of nautical tourism services, due to the existence of illegal State aid in the form of tax relief.

V. Enforcement of competition rules in the nautical tourism sector in Croatia

1. EU Pilot file opened regarding the assignment of communal berths in port open to public traffic

As regards the assignment of communal berths, an EU Pilot[31] file, number EU-PILOT 7341/15/GROW, was opened against Croatia. The applicant, a national of an EU Member State, complained about the decision of the port authority in Poreč (Croatia), which refused his request for the assignment of a communal berth in a port open to public traffic of local importance, located in the area of that port authority because there were no communal berths available for all applicants, and because he had no permanent residence in the area of that unit of local/regional self-government. In the complaint, the applicant invoked Directive 2006/123/EC[32] on the services on the internal market, which prescribes that Member States must ensure that the general conditions of access to a service, which are made available to the public, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing

[30] See section IV.2.

[31] EU Pilot is a mechanism for an informal dialogue between the Commission and the Member State concerning issues related to potential non-compliance with EU law, prior to launching a formal infringement procedure. EU Pilot involves the use of an online database and communication tool through which the Commission and the national governments share information on the details of particular cases. More information available at: at www. http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/eu_pilot/index_en.htm (accessed on 23.07.2021).

[32] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, (OJ 2006 L 376/36–68).

for differences in the conditions of access where those differences are justified by objective criteria (Article 20(2) and (3)). The Ministry of Maritime Affairs, Transport and Infrastructure responded to the European Commission that permanent residence in the area of the unit of local/regional self-government in which the port is located or the nationality of the owner of the vessel is not a precondition for the assignment of a communal berth. The only precondition for the assignment of a permanent berth is that the vessel is locally registered in the area of the competent harbourmaster's office. It is true that owners who have permanent residence in the area of the unit of local/regional self-government in which the port is located have priority for the assignment of communal berths.[33]

The reason for this could be found in the fact that Croatian islands and some parts of the coastal area are very sparsely populated. The accessibility of permanent berths in the communal part of ports is very important in order to ensure mobility of local inhabitants, to stimulate their employment, the performance of traditional economic activities, such as fisheries, and consequently to encourage them to remain in these areas. The Commission accepted the written answer of the Croatian Ministry and decided not to launch a formal infringement procedure in this case, but it recommended that a waiting list for the assignment of communal berths must be publicly announced in order to ensure transparency.

2. The 'marinas cartel'

Cartels as forms of explicit collusion by which competitors explicitly fix prices or output, divide markets or customers or exchange commercially sensitive information are forbidden by Croatian Competition Act.[34] Croatian Competition Law is modelled after EU Competition Law[35], but the number of cartel cases solved by the CCA is still very low. This is evidence of weak enforcement of competition law in Croatia (for an in-depth analysis of the CCA's decision-making practice see Pecotić Kaufman, 2021; Pecotić Kaufman, 2009).

[33] See section II.3.

[34] Pursuant to Article 8(4) of the Croatian Competition Act such agreements are *ex lege* null. See Official Gazette of the Republic of Croatia, no. 79/2009, 80/2013, 41/2021.

[35] The first Croatian Competition Act was drafted in 1995 under the influence of EC competition Law. More thorough harmonization of Croatian Competition Law with EU Competition Law was achieved with the Competition Acts adopted in 2003 and 2009 (revised in 2013 and 2021).

In 2013, the CAA started proceedings against the Croatian Chamber of Economy and nine members of the Croatian Association of Nautical Tourism (Marina Association) following the initiative of the undertaking Aba Vela (Bulum, 2017, p. 361).[36] It was established that the representatives of the marina operators who participated in the meeting of the Council of the Marina Association, organized by the Croatian Chamber of Economy in October 2012 in the town of Biograd n/m (Croatia), exchanged information relating to future pricing policies for berthing services. It is the only cartel agreement uncovered in the Croatian seaport sector so far.

The CCA considered the following statement of the president of the Marina Association as breach of competition rules: 'In 2013 marinas will not raise the prices of berthing services, whereas those which will raise the prices, will do so merely to adjust for inflation in the Republic of Croatia.' Even though the CCA did not establish the existence of an explicit agreement between the participants of the meeting on the price increase, it was established that strategic information on future pricing policy had been exchanged, which was qualified as behaviour considered as a concerted practice of the parties concerned.

In order to facilitate the detection of cartels, the European Commission developed a common classification doctrine according to which it is not necessary to precisely define the form, that is, whether it is an agreement or concerted practice, because both of them represent a breach of Article 101 TFEU (Butorac et al., 2013, p. 114; Poščić, 2011, pp. 338–343).[37] A practice involving the exchange of individual data about future pricing intentions between competitors increases the risk of collusion. It constitutes a hard core restriction of competition.[38]

According to the judicial practice of the CJ, when an undertaking participates in a meeting where strategic information is exchanged and receives such strategic information from a competitor, it is presumed that it

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[36] These are Adriatic International Club, Tehnomont, Marina Šibenik, Ilirija from Biograd, Marina Hramina from Murter, Shipyard and Marina from Betina, Marina Punat, Marina Dalmacija and Marina Borik from Zadar. See, case Klasa: UP/034-03/2013-01/047, Urbroj: 580-09/74-2015-164. See, Official Gazzete of the Republic of Croatia, no. 58/2015.

[37] Commission Decision of 27.07.1994, Case IV/31.865 *PVC* (OJ 1994 L 239/14), paras. 30–31. The CJ upheld the Commission's point of view concluding that a comparison between the definition of an agreement and the definition of a concerted practice shows that they are forms of collusion having the same nature and they are only distinguishable from each other by their intensity and the forms in which they manifest themselves. See ECJ judgment of 8.07.1999, Case C-49/92 *P Commission v. Anic Partecipazioni*, ECLI:EU:C:1999:356.

[38] It represents a restriction of competition by object. For this reason, it is not necessary to establish its anti-competitive effects on the market. See C-49/92 *P Commission v. Anic Partecipazioni*, para. 123.

has accepted the information and adapted its market behaviour accordingly, unless it responds with a clear statement that it does not wish to receive such data and immediately leaves the meeting and informs a competition authority about this event (Pecotić Kaufman, 2012, pp. 30–34).[39] In this particular case, none of the representatives of the marina operators left the meeting before its end, nor did they inform the CCA about the exchange of the commercially sensitive information between the marinas.[40] Consequently, the CCA decided that such behaviour constituted a concerted practice facilitating collusion of all the participants in the meeting. The CCA also brought proceedings against the Croatian Chamber of Economy considering that its representative should have warned the participants in the meeting that sharing of sensitive data on future pricing policies is not in accordance with competition rules. The parties of the cartel were fined a total of 2,263 million HRK (approx. EURO 298 000). The parties filed a lawsuit against the decision of the CCA with the High Administrative Court of the Republic of Croatia.[41] Therein, the representatives of the marina operators claimed that they had not heard the statement of the president of the Marina Association because it was made at the end of the meeting when most of them had already left. They also claimed that they had not received the minutes[42] of the meeting by e-mail, which was the customary way of delivering them.

Considering the fact that the representatives of the marina operators had not received strategic information on future pricing policies, they were, therefore, not obliged in their opinion to distance themselves from that information and inform the CCA about it. The High Administrative Court of the Republic of Croatia gave credence to the statements of the representatives

[39] CJ judgement of 7.01.2004, Joined cases C-204/00 *P Aalborg Portland A/S*, C-205/00 *P Irish Cement Ltd*, C-211/00 *P Ciments français SA*, C-213/00 *P Italcementi – Fabbriche Riunite Cemento SpA*, C-217/00 *P Buzzi Unicem SpA* and *Cementir – Cementerie del Tirreno SpA v. Commission of the European Communities*, ECLI:EU:C:2004:6, paras. 81–86.

[40] As Croatian competition law does not include detailed rules on the exchange of information and agreements between competitors, the CCA, pursuant to Article 1 of the Treaty on the Accession of Croatia to the EU (Official Gazette, International Treaties, no. 2/2012), in cases of legal gaps and uncertainties applies the criteria arising from the application of the competition rules applicable in the EU in the application of the Croatian competition rules. The case law of EU Courts is a particularly important instrument for overcoming legal gaps and uncertainties relating to the interpretation of the Croatian rules on competition (Article 74 of the Croatian Competition Act).

[41] The legality of the CCA's decisions is controlled by the High Administrative Court of the Republic of Croatia. See, case Usll-39/15-10, available at: www.aztn.hr/ea/wp-content/uploads/2016/05/UP-I-034-032013-01047-1.pdf (accessed 23.07.2021). On the topic of the judicial control of CCA decisions we would like to refer to (Akšamović, 2020, pp. 7–25).

[42] The statement of the president of the Marina Association about the future pricing policy of marinas was contained in the minutes of the meeting.

of the marina operators and found in their favour. The Court returned the case to the CCA for reconsideration and ordered the CCA to submit evidence that the minutes had been delivered to the parties who participated in the meeting. As the preliminary investigation of the relevant market and collection of data by the CCA in this case was conducted in 2013, when the CCA still had no digital forensic equipment,[43] the authority was not able to establish whether the marina operators received the minutes of the meeting in Biograd n/m during the announced inspections (dawn raids) of their business premises, especially their computers and servers at that time.

The ruling of the High Administrative Court of the Republic of Croatia was made in March 2016, three years after the beginning of the proceedings before CCA. By that time, the marina operators had already learned which evidence could incriminate them and so they could have destroyed it. For this reason, the CCA decided that there was no purpose in continuing with the proceedings and suspended them. The CCA could not prove that the minutes had been delivered to the parties, participants in the meeting, due to CCA's limited resources and the unavailability of digital forensic equipment. Consequently, the CCA failed to determine whether a cartel agreement or a concerted practice between marinas had been realised or not.

Although the High Administrative Court of the Republic of Croatia insisted for evidence to be presented as to the delivery of the minutes of the meeting in Biograd n/m to the marina operators by e-mail, part of the Croatian legal doctrine considers (as does the authors of this article, Bulum, 2017, pp. 361–378) that the fact that the marina operators met and discussed prices, which is evidenced in the minutes of the meeting containing the statement of the president of the Marina Association, which were submitted to the Court by the CCA, represented material evidence that the marina operators had exchanged strategic information on future pricing policies. For this reason, this is without a doubt a case in which the behaviour of competitors can be described as a concerted practice.

[43] Digital forensic equipment is an indispensable tool for discovering what happened on a computer, server or other data storage media and finding the responsible person. It is used in dawn raids. Although the CCA's competence to carry out dawn raids was established by the Competition Act from 2003, the Ministry of Finance approved resources from the state budget for the purchase of digital forensic equipment and training of CCA experts for using that equipment only in 2014?! For that reason, in the period of over ten years, only a small number of cartel cases were uncovered and sanctioned showing an overall weak implementation of competition law. As a consequence thereof, a higher level of prices of products and services offered in Croatia, in comparison to other EU Member States, could be observed.

VI. Conclusion

Considering the importance of nautical tourism, the income realised from it and the constant growth of this branch of the Croatian economy, the legal rules that regulate it are rather scarce. As a consequence, many issues within the matter of nautical tourism in Croatia are not adequately regulated. This paper is limited to the analysis of competition on the market of services in nautical tourism in Croatia between facilities intended for nautical tourism, marinas in particular, and ports open to public traffic. Under the current legal regime applicable to the latter, ports open for public traffic are in a more favourable competitive position when compared to marinas, and other facilities intended for nautical tourism with which they compete on the market of services in nautical tourism in Croatia, because of the corporate tax exemption granted to port authorities that operate ports open for public traffic. The consequence of the current position of marinas on the market could be a reduction in private sector investments made in such ports. This will significantly slow down their modernisation and development.

For that reason, in our view, within the framework of the future changes of port and tax legislation in Croatia, the role and the legal regime of port authorities should be re-examined, since these entities, besides the typical public authority functions, additionally perform activities of economic nature, such as the provision of berthing services to nautical tourism vessels. In other words, they rent out the public maritime domain to private users for berthing yachts and other pleasure craft. Port authorities should therefore, according to the case law of the EU Courts, be classified as undertakings with regard to the abovementioned activities.

Hence, *de lege ferenda*, all port operators providing berthing services for nautical tourism vessels in Croatia, including port authorities in public ports, should be subject to corporate income tax in relation to the revenues generated by renting berths for nautical tourism vessels, in order to prevent distortions of competition on the market of nautical tourism services, due to the existence of illegal State aid in the form of tax relief.

This will contribute to the creation of a level playing field for all port operators which provide services in nautical tourism. Consequently, a development of nautical tourism and economic growth based also on this important branch of the Croatian economy could be achieved.

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