European Business Organization Law Review 5: 363-387

doi10.1017/S1566752904003635

Croatian and EC Competition Law: State and Problems of the Adjustment Process

Bojana Vrcek*

Abstract

The purpose of this article is to introduce and briefly analyse Croatian competition law in the light of EC competition law standards. The analysis will be kept at a general level, essentially offering an overview of Croatia's legislative framework in the field of competition law, including the Competition Law that was in force from 1995 until October 2003 and the new Competition Law that was enacted on 21 July 2003 and entered into force on 1 October 2003. An indepen-

---

* Master of European Studies; Ph.D. student, University of Hamburg and Europa-Kolleg Hamburg; currently working at the European Commission, DG Competition, Brussels.

dent Croatian competition authority, the Agency for the Protection of Market Competition, was created in 1995 and began its work in 1997. The Agency is directly responsible to the Croatian Parliament.

In addition, this article analyses the competition provisions of the EC-Croatia Stabilisation and Association Agreement, which was signed in October 2001 and is awaiting ratification by the EU Member States. An Interim Agreement including a number of competition rules has been in force since March 2002. In February 2003, Croatia applied for EU membership.

Keywords: Croatian competition law, Stabilisation and Association Agreement, Agency for the Protection of Market Competition, entrepreneur as undertaking, approximation of laws, competition law and privatisation process, Telecommunications Council, Energy Council.

1. Introduction

Free market competition in Croatia has been raised to the constitutional level. The Croatian Constitution[1] establishes a market economy that protects entrepreneurial and market freedoms as fundamental economic rights. The State must ensure an equal legal status for all undertakings in the market. The abuse of monopolistic positions regulated by law is prohibited.[2] To ensure the implementation of these constitutional provisions, the first Law on the Protection of Market Competition (hereinafter, old Croatian Competition Law or old CCL) was enacted in 1995 and entered into force on 22 June 1995 (and was amended in 1997 and 1998).[3] It was inspired by US, Italian, German and EC antitrust legislation.

As the European Commission has already concluded in its first and second Stabilisation and Association Reports on Croatia,[4] some changes were needed in the existing legislation, firstly because of weaknesses in the field of enforcement, but also because of Croatia's obligation to adjust its domestic law to EC competition rules. Therefore, on 21 July 2003, the second Law on the Protection of the Market Competition[5] (hereinafter, new Croatian Competition Law or new

---

[1] *Ustav Republike Hrvatske* [Constitution of the Republic of Croatia], *Narodne novine* [Official Gazette of the Republic of Croatia] 41/2000 (consolidated text) and 55/2001 (amended text).

[2] Art. 49(1) and (2) of the Croatian Constitution.

[3] *Zakon o zaštiti tržišnog natjecanja* [Law on the Protection of Market Competition], *Narodne novine* 48/95, 52/97 and 89/98.

[4] See the Second Annual Report on the Stabilisation and Association Process for South East Europe, COM (2003) 139 final, Working Paper on Croatia, SEC (2003) 341, p. 25.

[5] *Zakon o zaštiti tržišnog natjecanja* [Law on the Protection of Market Competition], *Narodne novine* 122/2003 of 30 July 2003.

CCL) was enacted. The new CCL entered into force on 28 July 2003 and it has been applying since 1 October 2003.[6] This article discusses some crucial changes in the new legislation.

The adoption of competition law constitutes a vital element in the transition process as well as in the process of competition policy globalisation.[7] Unfortunately, the importance of the role of market competition for the market economy was not recognised at the very beginning of the Croatian transition process.[8] Apart from trade liberalisation, the restructuring and privatisation of State-owned enterprises, demonopolisation and antitrust policy did not play an essential role in this process. If there is no enforcement of competition law during the transition period, domestic firms are much less likely to use the period for its intended purpose, such as making investments and taking other steps to increase their efficiency.

Many experts believed that the transition to a market economy could be achieved quite easily in Croatia's former self-management system, which had long been regarded as a relatively successful and market-oriented alternative to the socialist economy.[9] However, the transition process in Croatia has progressed but it is still not completed.[10] Transition indicators like price liberalisation, trade and foreign exchange, competition policy and financial institutions show that in 2002 Croatia was ranked by European Bank for Reconstruction and Development (EBRD) among advanced economies like Poland, Slovenia, Hungary, the Czech Republic and Slovakia,[11] but that it has not performed well in the field of competition policy, where it received a score of 2+ (scores range from 1 to 4; + represents 0.25). If a country does not enforce competition law during the transition period, domestic firms are much less likely to use the period for its intended purpose, namely, to make investments and take other steps that will make them more efficient. Instead, they are likely to spend this period exploiting domestic consumers and trying to create entry barriers that will pre-

---

[6] Art. 70 new CCL.

[7] See William E. Kovačić, 'Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement', 77(1) *Chicago-Kent Law Review* (2001) p. 266.

[8] In Croatia, the opinion of the legislator was that the CCL should be the 'crown' of the market legislation that should be enacted once all other market laws and institutions were in operation. See Deša Mlikotin-Tomić, 'Croatian and European Competition: Legislation and Practice', in Vinko Kandžija, et al., *Economic System of European Union and Adjustment of the Republic of Croatia* (University of Rijeka, Faculty of Economics 1997) p. 187.

[9] See Petar Šarčević, ed., *Privatisation in Yugoslavia and Croatia* (London, Graham and Trotman 1992) p. 81.

[10] See European Commission, Directorate General for Economic and Financial Affairs, *The Western Balkans in Transition*, Report No. 5 (January 2004) available at: <http://europa.eu.int/comm/ economy_finance>.

[11] EBRD, Transition Report 2000, p. 14.

vent foreign firms from entering after the transition.[12] The implementation of competition law and policy will therefore play an important role both in Croatia's further integration into the EC internal market and during the post-transition period. The EU is not only asking for written commitments. These commitments have to be mirrored in domestic legislation, but the EU also needs to see evidence of an adequate administrative capacity ensuring the ability to implement the commitments. At the very least, the record of the concrete day-to-day enforcement of competition rules must show a high degree of similarity with enforcement practice in the EU.[13] This is because the EU's approach is to consider a country ready for EU membership only if its companies and public authorities have become accustomed to a competition regime like that of the EU well before the date of accession.

2. Substantive law provisions and their enforcement

2.1 **The scope of Croatian competition law**

Both the old and the new CCL contain a definition of an undertaking – each for its own purpose – which is not the case with the EC Treaty.[14] In order to determine the addressee of its provisions, the old CCL and the new CCL both refer to the criterion of performing economic activity (in Art. 3(1) CCL), which is the same as the functional concept developed by the ECJ. The CCL applies to every legal or natural person who realises a periodic or one-time trade of goods and services in the Croatian market (Art. 3(2) CCL). It not only addresses the undertaking via the functional criterion but also lists companies, sole proprietors, craftsmen or other legal or physical persons in Article 3(1) new CCL. Article 5 (3) new CCL defines its addressees as 'entrepreneurs'. In Croatia, this term is preferred to the term 'undertakings', because the latter refers to commercial companies under the old Law on Undertakings.[15] For the purpose of this article, however, the term 'undertakings' will be used.

---

[12] See T. Winslow, 'OECD Competition Law Recommendations, Developing Countries, and Possible WTO Competition Rules', 3 *OECD Journal of Competition Law and Policy* (2001) p. 124.

[13] See speech by Mario Monti at the 8th Annual Competition Conference between the Candidate Countries and the EC, available at: <http://europa.eu.int/competition/speeches>.

[14] The ECJ has repeatedly defined the concept of an undertaking as 'any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed', see e.g. ECJ, Case C-41/90 *Klaus Höfner and Fritz Elser* v. *Macrotron GmbH* [1991] *ECR* I-1979, para 21.

[15] See Nenad Pešut, 'Kartellrechtliche Bestimmungen in der Republik Kroatien' [Competition Law Provisions in the Republic of Croatia], in *Handbuch des Wirtschaftsrechts in Osteuropa* [Handbook on Business Law in Eastern Europe] (Munich, Beck Verlag 1997) p. 41.

The new CCL also opts for an extraterritorial application in relation to the effects doctrine. It will be applied to foreign legal and natural persons whose seat or residence is located abroad, if their participation in the trade in goods and services has an impact on the Croatian market (Art. 3(3) new CCL). As in the case of the old CCL, the new CCL does not provide exact criteria regarding the cases in which and the conditions under which it is applicable to foreign undertakings. These are provided by the Agency for the Protection of Market Competition (hereinafter, the Agency) in its merger control practice,[16] as well as by the Council for the Protection of Market Competition (hereinafter, the Council) in its Decision of 14 December 1999.[17] In the case of concentrations in which neither party has subsidiaries in Croatia and the impact on the Croatian market is not considerable, there is no obligation to notify the concentration.[18] In this case, the legal basis appeared in Article 5(2) old CCL, which stated that the law should not apply to deals and contracts that do not affect the domestic market and do not have adverse effects on the interests of other domestic undertakings taking part in operations, both in the domestic and international market, provided that international agreements signed by Croatia do not stipulate otherwise. On the other hand, in the *Volvo/Renault V.I.* merger case,[19] none of the parties had a Croatian subsidiary or shares in a Croatian company, but the obligation for notification was confirmed because of the presence of their products on the Croatian market, although the Agency did not mention the market share of the parties. The same applied in the *Exxon/Mobil* merger case.[20] The opposite occurred in the decision in the *Hewlett-Packard (HP)/Compaq* merger case,[21] where the potential effects on the Croatian market were confirmed because HP has a subsidiary and Compaq has distributors in Croatia. In addition, the Agency explicitly mentioned the clearance decisions of the US Federal Trade Commission and the European Commission. The same occurred in the *Brauerei Beck/Ameli GmbH* merger case,[22] where the clearance decision of the European

---

[16] See e.g. the Decision in *Lek farmacevtska družba d.d/Servipharm AG* of 14 February 2003, *Narodne novine* 23/2003, which falls under Croatian merger control because one of the parties had a representative office in Croatia and the other a subsidiary.

[17] Decision of the Council at its 33rd meeting of 14 December 1999.

[18] In the *MAN Roland Druckmaschinen AG, Offenbach am Main/Bruder Henn Betriebs AG, Wien* case, the Agency decided there was no impact on the Croatian market because only one of the parties had a subsidiary in Croatia (Decision of 2 May 2001, *Annual Report of the Agency for the Protection of Market* Competition (hereinafter, *Annual Report*) 2001-2002, p. 144). In the *Shade Acquisition Corp.-Luxottica Group S.p.A., USA/Sunglass Hut International Inc., USA* case, there was no impact on the Croatian market because none of the parties had a subsidiary in Croatia (Decision of 26 February 2002, *Annual Report* 2001-2002, p. 174).

[19] Decision of 16 May 2001, *Narodne novine* 95/02 of 13 August 2002.

[20] Decision of 4 October 1999, *Narodne novine* 114/99 of 3 November 1999.

[21] Decision of 9 April 2002, *Narodne novine* 113/02 of 27 September 2002.

[22] Decision of 19 February 2002, *Narodne novine* 119/02 of 11 October 2002.

Commission was taken into consideration. The Agency is not consistent in its practice, because it always allows the notification and analyses the concentration when the parties insist on it, even if all conditions are not fulfilled.[23] In the antitrust area, there are no cases with an extraterritorial application of the old and new CCL. The new CCL does not contain the relevant provision from Article 5(2) old CCL.

With regard to public undertakings, there is a provision in Article 4 new CCL that is similar to Article 86 EC. It provides that the CCL will be applied to legal and natural persons who, pursuant to special legal provisions, have been entrusted with the task of performing public services, or have been granted special or exclusive rights or concessions, except in the cases in which the application of the CCL would prevent the accomplishment of the tasks established by the special regulations and for which they were set up.

Generally the CCL does not apply to contractual relations between principals and agents, employers and employees or employers and trade unions.[24]

In the new CCL, the definition of the addressees is extended, because undertakings that control other undertakings are also included.[25] New is the provision that defines the relevant market as the market of the goods or services that form the object of the economic activity of an undertaking that is active in the relevant geographic market.[26] The Croatian Government should enact further rules on market definition.[27] This is a new approach of the CCL, according to which the secondary legislation for the implementation of the new CCL will be enacted by the Croatian Government in the form of regulations. It is inspired by EC law.

2.2 **Agreements**

The original concept in the old CCL for counteracting agreements restricting competition was similar but not identical to Article 81 EC. First of all, Article 7 (1) old CCL contained a general prohibition on agreements restricting competition. Agreements is a common technical term for contracts, stipulations of contracts, understandings between undertakings, and concerted practices or decisions of a groups of undertakings that have as their object, effect or possible effect the restriction or prevention of competition. Prohibited agreements were declared null and void by Article 7(2) old CCL.

---

[23] See <http://www.crocompet.hr>, Frequently-Asked-Questions (FAQ).
[24] Art. 6 new CCL.
[25] Art. 5 new CCL.
[26] Art. 7(1) new CCL.
[27] Art. 7(2) new CCL.

Nevertheless, such agreements could have been assessed under Article 10 old CCL. An agreement was not regarded as infringing Article 7 old CCL if it fulfilled conditions like the improvement of the quality of goods and services, the improvement of market supply, the shortening of the distribution chains of goods and services and the lowering of prices, provided that its purpose was not the short-term lowering of prices below production costs aimed at ensuring or achieving a monopolistic or dominant position in the market.[28] These conditions are comparable to those in Article 81(3) EC, except for the condition that the restrictions should be indispensable to the attainment of the above-mentioned positive effects, which was not included in the latter. In the Croatian doctrine, Article 10 old CCL was regarded as a *rule of reason* approach.[29] It therefore differed somewhat from EC law, which does not adopt this approach.[30]

According to Article 11 old CCL, moreover, specialisation agreements, exclusive or selective distribution agreements, franchising agreements and research agreements could be exempted from the general prohibition if they fulfilled the conditions prescribed by the CCL. Group exemptions were not provided for under the first legislative concept. It was up to The Agency to decide whether all or part of the agreement was in accordance with the CCL. There was a 30-day notification obligation beginning on the day of the conclusion of the agreement that could be exempted from the prohibition according to Articles 10 and 11 old CCL.[31]

Agreements of minor importance were also exempted from the general prohibition. In contrast to EC law, the *de minimis* provision was defined by the total annual turnover of the parties, which could not be more than HRK 60 million, provided that this did not represent more than 50 per cent of the total turnover in the same field of activity in the domestic market.[32] Furthermore, agreements were not to be regarded as prohibited if the turnover of all the parties did not exceed 5 per cent of total market turnover or 25 per cent of the total turnover of the relevant market.[33]

As trade distribution networks were very much underdeveloped at the beginning of the application of competition law and most other vertical agreements were not known to the Croatian legal system, the Agency was very likely to

---

[28] Art. 10 old CCL.

[29] See Deša Mlikotin-Tomić, 'Ugovor o franchisingu I pravo konkurencije' [The Franchising Contract and Competition Law], 4 *Pravo u gospodarstvu* [The Law in the Economy] (2000) p. 62; I. Pezo, 'O kažnjivosti povreda slobodnog tržišnog natjecanja' [On the Incrimination of Competition Law Infringements], 7 *Hrvatska pravna revija* [Croatian Law Review] (2001) p. 97.

[30] See European Commission, *White Paper on the Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, OJ* 1999 C 132/1.

[31] Art. 12 CCL.

[32] Art. 9(1) CCL.

[33] Art. 9(2) CCL.

evaluate vertical restraints in accordance with the criteria of EC law.[34] It used to confirm an approximation of the relevant EC provisions in its decisions, like in the case of the licensing agreement between *Tvornica duhana Zagreb d.d./Rothmans of Pall Mall (International) Limited*.[35] or the distribution agreements between *Zagrebacka pivovara d.d./23 distributors*.[36] Some legal definitions of distribution agreements were included in the Trade Act in 1996.[37]

The new CCL also contains a general prohibition clause for agreements restricting competition in Article 9(1) new CCL. New is the provision in Article 9 (2) new CCL that declares only those agreements that cannot be granted an individual or group exemption as null and void. There is no longer an obligation to notify all agreements, as in the old system, nor those that fulfil the conditions laid down in Article 10 new CCL.[38] However, undertakings can make a request for an individual exemption.[39] There is a new clause introducing group exemptions[40] that will be enacted by the Government in the six-month period following the entry into force of the new CCL.[41] The approach of Article 81 EC[42] has thus been accepted, with the difference that the right to request an individual exemption has been granted. It remains to be seen whether this is a good solution, taking into consideration that the CCL has only been implemented for six years.[43] A *de minimis* rule is not defined in the new CCL. It will also be defined by a regulation of the Government.[44]

---

[34] See Decision of 30 April 2003, *Narodne novine* 72/2003.

[35] See Decision of 5 November 1999, *Glasnik* (Official Gazette of the Agency for the Protection of Market Competition) 2/2000, p. 82-91.

[36] See e.g. Decision of 30 April 2003, *Narodne novine* 72/2003.

[37] *Zakon o trgovini* [Trade Act], *Narodne novine* 11/96, 75/99, 62/01, 109/02, 49/03 (consolidated text) and 103/03.

[38] Art. 11(3) new CCL.

[39] Art. 12(1) new CCL.

[40] Art. 11 new CCL.

[41] Art. 67(3) new CCL.

[42] See Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in articles 81 and 82 of the EC Treaty, *OJ* 2003 L 1/284.

[43] See A. Deringer, 'Stellungnahme zum Weißbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Art. 85 und 86 EG-Vertrag (Art. 81 und 82 EG)' [Opinion on the White Paper of the European Commission on the Modernisation of the Rules for the Application of Articles 85 and 86 of the EC Treaty (Arts. 81 and 82 EC Treaty)], 1 *EuZW* (2000) s. 11.

[44] Art. 13(3) new CCL.

Between 1997 and 2001, 954 proceedings were initiated concerning agreements, which constitutes 64.42 per cent of all proceedings initiated at the Agency.[45] In 1999, 96 per cent of the proceedings were initiated *ex officio*, but only 8 per cent were in 2000.[46]

2.3 **Abuse of dominant position**

The old CCL distinguished between the 'monopolistic' and 'dominant' position of one or more undertakings. The abuse of dominant and monopolistic market positions were both regarded as 'monopolistic practices'.[47] This solution was introduced because of the existence of State-owned monopolistic undertakings, which had legally-guaranteed monopolistic positions based on special laws. Since the publication of the third edition of the Constitution, the abuse of such monopolistic positions is also prohibited at the constitutional level.[48] A monopolistic position exists when one undertaking has no competitors in a particular market.[49] An undertaking has a dominant position in a market (or part of it) if, as a supplier or buyer of certain goods or services, it possess a 'superior position' to its competitors with regard to its market power.[50] In addition, two or more undertakings may have a joint dominant market position.[51] The Agency has interpreted such dominance as the 'capacity to act to a large extent independently of competitors and other undertakings, preventing them from entering the market and competing on an equal basis'.[52] The old CCL provided a legal definition of the relevant market, which should be regarded as the geographic or production market in regard to which the undertaking's power is manifested.[53]

According to the legal criteria of the old CCL, an undertaking held a dominant position if its share of the relevant market (or part of it) exceeded 30 per cent.[54] There were also legal criteria concerning the dominant position of two undertakings (more than 50 per cent), three (more than 60 per cent), four (more

---

[45] See Tatjana Ružić, 'Pravo tržišnog natjecanja – gospodarski aspekti' [The Economic Aspects of Competition Law], in Ministry for European Integration, *Prilagodbe politikama unutarnjeg tržišta EU: očekivani učinc*i [Adaptation to Internal Market Policies: Expected Results] (Zagreb 2002) p. 79.

[46] Ibid., at p. 80.

[47] Art. 13 old CCL.

[48] Art. 49 of the Croatian Constitution.

[49] Art. 14 CCL. See the Decision in *Boninovo d.o.o.* of 5 July 2001, *Narodne novine* 64/01 of 16 July 2001.

[50] Art. 15(2) old CCL.

[51] Art. 15(3) old CCL.

[52] See the Decision in *Dalmacija auto d.d.* of 14 November 1997, *Glasnik* 1/1999, p. 38, also confirmed by the Administrative Court, Decision of 15 November 2000.

[53] Art. 19 old CCL.

[54] Art. 16 old CCL.

than 75 per cent) and five (more than 80 per cent).[55] The criteria that had to be taken into consideration in the evaluation of the market power of undertakings were listed in Article 18 old CCL.

In the new CCL, there is a change regarding the legal criteria of what constitutes a dominant position, which will be presumed to exist if the market share of one undertaking exceeds 40 per cent, if the market share of two or three undertakings exceeds 60 per cent or if the market share of four or five undertakings exceeds 80 per cent in the relevant market.[56] In addition, the definition of a dominant position is very similar to the one in EC law that defines as dominant an undertaking that can act independently from its real or potential competitors, consumers, buyers or suppliers.[57] The provision concerning monopolistic positions has been deleted from the new CCL.

The provision on abusing practices includes such frequent market behaviour as intentional excessive direct or indirect high pricing or temporary low pricing below unit costs with the aim of assuming or preserving a dominant or monopolistic position, sharing a market segment according to area, product, service or consumer groups, and applying dissimilar conditions to identical or equivalent transactions with different undertakings, thereby placing them at a competitive disadvantage in all or part of the market (Art. 16(2) new CCL).

Between 1997 and 2001, 237 proceedings were initiated, representing 16 per cent of the total number of proceedings initiated at the Agency.[58] There has been a tendency for the Agency not to initiate and solve all cases of monopolistic practices that are known to it because of a lack of experience, a need for greater expertise and a lack of cooperation with regard to getting information from market players. This leads to a longer duration of the investigation process.[59] It is expected that this situation will change and the number of cases will grow as the Agency becomes more experienced and awareness of the CCL increases among market participants.

The fact that State and private oligopolies and monopolies still exist, with all the possible collusive behaviour, abuse of dominant position and presumed existence of entry barriers that this entails, suggests that competition policy needs to be especially vigilant.[60] It should err on the competition side of the argument.[61] A relatively large proportion (31.25 per cent) of applications concerning abuses of dominant position in the last reporting period concerned municipal

---

[55] Art. 17 old CCL.
[56] Art. 15(3) new CCL.
[57] Art. 15(1) new CCL.
[58] See Tatjana Ružić, loc. cit. n. 45, at p. 81.
[59] Ibid.
[60] See A. Mayhew, *Recreating Europe: The European Union's Policy towards Central and Eastern Europe* (Cambridge, Cambridge University Press 1998) p. 155.
[61] Ibid.

services like energy, gas, water, telecommunications and transportation.[62] It is therefore clear that the undertakings operating in these markets tend to abuse their privileged position, which was one of the reasons to establish special regulatory authorities for certain sectors that are dominated by large State or private companies, in order to make the work of the Agency easier.

2.4 **Merger control**

The old CCL employed the term 'concentrations', which is also known in the EC Merger Regulation (ECMR).[63] It was defined in Article 21(1) old CCL. The legal definition of a concentration covers every integration, affiliation, merger by acquisition, merger by forming a new company or by the acquisition of a majority shareholding or a majority of the voting rights, or other cases involving the acquisition of a controlling influence in a company.[64] A concentration that results in the creation or reinforcement of the monopolistic or dominant market position of an undertaking in such a way that competition is restrained or abolished either substantially or in the long term is prohibited.[65]

The Croatian legislator has adopted a system of preventive control over concentrations. This *ex ante* control is based on Article 23 old CCL, which includes a notification obligation for all concentrations that cross the threshold of the aggregate annual turnover of all involved undertakings, which exceeds HRK 700 million (€90 million) in the accounting period preceding the concentration. As a second condition, the annual turnover of at least two involved undertakings should exceed HRK 90 million (€11 million) in the accounting period preceding the concentration. Since the CCL was not clear regarding which conditions must be met, the Council decided this at its 41st meeting.[66] There is no clear indication whether, in determining the total proceeds of a company involved in a concentration, only the proceeds in Croatia are to be taken into account or also proceeds acquired elsewhere. This very low turnover threshold connected with high notification costs appears to have formed an obstacle to attracting more investment.[67]

---

[62] See *Annual Report* 2001-2002, p. 27.

[63] Art. 3 of Council Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings, *OJ* 1989 L 395/1, amended by Council Regulation (EC) No. 1310/97 of 30 June 1997, *OJ* 1997 L 180/1. See Commission Notice on the concept of concentration under Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings, *OJ* 1998 C 66/5 and 4 *Common Market Law Review* (1998) p. 586.

[64] Art. 21(1) old CCL.

[65] Art. 21(2) old CCL.

[66] Decision of the Council at its 41st meeting of 30 January 2001.

[67] See Werner Berg, Sabine Nachtsheim and Sylvia Kronberger, 'Zusammenschlüsse zwischen multionationalen Unternehmen und Fusionskontrolle' [Mergers between Multinational Undertakings and Merger Control], 1 *RIW* (2003) p. 18.

There is no provision in the old CCL that provides when the concentration should be notified. It may be concluded from Article 22(1) old CCL, which mentions the 'intention' of concentration, that the notification should be made before the consummation of the merger. In practice, however, a large number of concentrations are notified after their consummation. Because of limited awareness regarding the relevant competition law provisions, the Agency has been tolerant with regard to late notifications and has also reviewed concentrations that have already been consummated. In these cases, it was able to use its right to impose measures needed for removing restrictions to competition and imposing a deadline by which these measures had to be taken.[68] The Agency must reach a decision about a concentration within 90 days of the notification.[69] Concentrations in the banking sector or involving other financial institutions and insurance companies, are exempted from the obligation to notify concentrations that are registered for trading shares, provided that these shares are acquired temporarily and for the purpose of resale within a period of 24 months,[70] as regulated in Article 3(5) ECMR,[71] but with the difference that the exercise of the right to vote is not prohibited.[72] The details needed for the notification of a concentration are regulated by an implementing regulation entitled Regulation on the Administration of the Register of Concentrations.[73] The definition of a concentration in the CCL does not include the creation of joint venture, but legal scholars take the view that full-function joint ventures are also concentrations in the sense of Article 21(1) old CCL.[74]

The main wave of concentrations took place between 1997 and 2001, when 129 concentrations, which constitutes 8.64 per cent (%) of all proceedings initiated at the Agency, were notified.[75]

According to the new definition, which appears in Article 18 new CCL, a concentration is prohibited if it creates or reinforces the single or collective dominant position of one or more undertakings that may have a substantial impact on the prevention, restriction or distortion of competition, unless the undertaking(s) in question can prove that the concentration will strengthen market competition in a way that its positive impact will be more substantial than the

---

[68] Art. 36(2) CCL.

[69] Art. 23(2) CCL.

[70] Art. 25 CCL.

[71] Council Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings, *OJ* 1989 L 395/1.

[72] For a critical view, see N. Pešut, loc. cit. n. 15, at p. 41.

[73] *Uredba o načinu vodjenja upisnika o koncentracijama* [Regulation on the Administration of the Register of Concentrations], *Narodne novine* 30/97 of 19 March 1997.

[74] See Siniša Petrović, 'Koncentracije – oblici povezivanja gospodarskih subjekata' [Concentrations – Forms of Mergers between Undertakings], 8 *Pravo i porezi* [Law and Taxes] (1998) p. 16.

[75] See *Annual Report* 2001-2002, p. 8.

negative impact of creating or strengthening a dominant position. This clause is similar to the *Abwägungsklausel* or balancing-test clause in § 36 of the German Competition Law (*Gesetz gegen Wettbewerbsbeschränkungen*).

A further change concerns Article 19(2) new CCL, which contains the same definition as Article 3(2) ECMR, which provides that '[t]he creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity … shall constitute a concentration' that is known as a full-function joint venture'.[76] Non-full-function joint ventures, which have as their purpose the coordination of the competition behaviour of independent undertakings, are also assessed under Article 19 new CCL,[77] in a similar manner to the way they are assessed under EC law.[78]

The new CCL confirms the system of premerger control and sets a fixed period of eight days from the conclusion of the agreement or the publication of the public offer in which the concentration has to be notified.[79] The thresholds for notification are higher than before. The worldwide turnover of all the participants should be more than HRK 1 billion (€129 million) and the domestic turnover of at least two of them should be more than HRK 100 million (€12 million).[80] The substantive criteria that are listed in Article 25(2) new CCL are very much the same as those in Article 2 ECMR. The new CCL contains more procedural provisions concerning decisions that can be passed in the case of a notification. The concentration can be approved, prohibited or approved with conditions or measures that have to be fulfilled (Art. 26(3) new CCL). The Agency must reach a decision within three months of the day on which the proceedings were initiated (Art. 26(3) new CCL).

2.5 **Sanctions**

Under the old CCL, fines for the conclusion of prohibited agreements or abuse of a monopolistic or dominant position could vary from 1 per cent to 30 per cent of the annual turnover of the undertaking for the financial year in which the offence was committed.[81] In contrast to EC law, the person responsible could also be fined between HRK 40,000 and HRK 200,000 (between €5,000 and €26,000).[82] The fines for failing to notify an agreement pursuant to Article 12

---

[76] A distinction should be made between 'full-function' and 'non-full-function' or 'partial function' joint ventures, which are the subject of Art. 81 EC. See R. Whish, *Competition Law*, 4th edn. (London, Butterworths 2000) p. 749.

[77] Art. 19(5) new CCL.

[78] See Art. 2(4) ECMR.

[79] Art. 22(2) new CCL.

[80] Art. 22(4) new CCL.

[81] Art. 39(1) old CCL.

[82] Art. 39(2) old CCL.

old CCL, failing to notify a concentration pursuant to Article 22 old CCL or failing to comply with the requests of the Agency under Articles 34(1), 35 and 36 old CCL were set between HRK 500,000 and HRK 10,000,000 (between €65,000 and €1,300,000) for the undertaking. For the person responsible within the undertaking, the fines imposed could reach between HRK 30,000 and HRK 150,000 (between €3,800 and €19,000).[83] The fines imposed could thus be pretty high, yet the courts had no directives for determining the level of these fines.

According to Article 61 new CCL, the fines that can be imposed for the conclusion of prohibited agreements, abuse of dominant position or the implementation of a prohibited concentration can reach 10 per cent of an undertaking's annual turnover in the year before the competition was restrained.[84] In addition, the person responsible within the undertaking can be fined between HRK 50,000 and HRK 200,000 (between €6,500 and €26,000).[85] For misdemeanours such as submitting false information regarding the application for an individual exemption or notification, failing to submit a notification or not executing the decisions of the Agency or the courts, the relevant undertaking can be fined 1 per cent of its annual turnover from the previous year. For the same misdemeanours, the person responsible within the undertaking can be with fined between HRK 15,000 and HRK 50,000 (€2,000 and €6,500).[86]

The old CCL did not and the new CCL does not offer the possibility of imposing a reduced fine on a member of a cartel that voluntarily approaches the Agency to admit its participation in a cartel and to provide the evidence that will enable the Agency to bring proceedings successfully, as this is already possible under the European Commission's Leniency Notice.[87]

There are big deficits in the enforcement of the penalty rules. The Agency itself cannot impose any fines. Therefore, also according to the new CCL, the Agency is still obliged to initiate proceeding before Misdemeanour Courts.[88] In total, the Agency has filed 36 requests to initiate proceedings against undertakings and responsible persons before Magistrates' Courts. In response to these requests, 26 decisions were made and a fine was imposed in only four cases.[89] In 30.77 per cent of the cases, the statutory limitation was exceeded. Other reasons for this inefficient procedure include the fact that the courts are flooded with cases in Croatia in general, but an even greater problem is the insufficient education of magistrates in competition law matters.

---

[83] Art. 40 old CCL.
[84] Art. 61(1) new CCL.
[85] Art. 61(2) new CCL.
[86] Art. 62(2) new CCL.
[87] Commission Notice on the non-imposition or reduction of fines in cartel cases, *OJ* 1996 C 207/4.
[88] Art. 60 new CCL.
[89] See *Annual Report* 2001-2002, p. 13.

3. Procedural and institutional framework

3.1 **Introduction**

Ensuring efficient competition in the market is a formidable challenge in which the competition authority plays an essential role. This means that it must have adequate administrative capacity. The regulatory antitrust body in Croatia is the *Agencija za zastitu trzisnog natjecanja* (Agency for the Protection of Market Competition). It was founded in 1995 but started its work almost two years later, on 24 February 1997, after receiving financial support and offices via the State budget.[90]

3.2 **Procedures**

Substantive law provisions are important but do not in themselves suffice to ensure the effective enforcement of statutory prohibitions concerning restrictive practices and abuse of dominant position, as well as the preventive control of concentrations. The provisions concerning procedural rules were rather few under the old CCL. They were concentrated in just one provision of Article 34 old CCL that regulated the initiation of proceedings by the Agency as well as the rights of the Agency in the investigation process. For all other procedural rules, the Agency must look to the provisions of the General Administrative Procedure Act.[91]

Two-thirds of the provisions in Articles 39 to 59 of the new CCL relate to procedural matters. This is a positive change that should contribute to legal certainty, making the procedures within the Agency more transparent and providing the Agency with a more appropriate procedural framework. The provisions from the new CCL are *lex specialis* in relation to the General Administrative Procedure Act.[92]

Proceedings may be initiated either by private parties or by the Director of the Agency (Art. 41 new CCL). In 2001-2002, 38 proceedings, or 20.32 per cent of all proceedings, were initiated *ex officio*, up from 7.2 per cent in 2000.[93]

The judiciary plays an important role in the enforcement of competition rules. It should be ensured that judicial appeals are available in a fair and timely manner. There are some deficits in Croatia in this regard. Against the decision of the Agency, parties can submit their claim to the Administrative Court, also accord-

---

[90] See Report on the Work of the Agency for 1997 (short version), *Glasnik* 1/1999, p. 24.

[91] *Zakon o općem upravnom postupku* [Law on the General Administration Procedure], *Narodne novine* 53/91.

[92] Ibid.

[93] See *Annual Report* 2001-2002, p. 27.

ing to the new CCL.[94] In this respect, the standard of rule of law is fulfilled, as there are two instances. However, since the Administrative Court is not yet familiar with the CCL, in the 39 proceeding that were initiated at the Court against the Agency's decisions, the Court rendered judgments in only 17 cases, including the acceptance of three complaints.[95] The Court's decisions can be appealed to the Croatian Supreme Court.

The new CCL accepts the old system of imposing fines, that is to say, financial penalties imposed by Misdemeanour Courts.[96] The Agency submits a request to initiate the proceedings, together with an elaborate penalty proposal for the respective violation, to the Magistrates' Court.[97] In the second instance of the penalty proceedings, the High Magistrates' Court of the Republic of Croatia is responsible. Only two misdemeanour proceedings were initiated in 1997, only sixteen in 1998 and only six in 1999 and 2000.[98] There is a problem that the courts wait until the Administrative Court decides about the claim against the decision of the Agency. The Misdemeanour Courts see its decision as a preliminary issue and do not want to impose fines until the end of the administrative procedure.[99] Since the latter tends to have a long duration, the fines become barred by the statute of limitations, which originally stood at three years and for these reasons was prolonged to five years by Article 41a old CCL. According to the new CCL, the period now stands at three years (Art. 64 new CCL).

3.3 **The Agency for the Protection of Market Competition**

The Agency is a special independent authority within the executive. It is responsible to the Croatian Parliament[100] and was founded by the Parliament (House of the Representatives) for the purpose of controlling and maintaining market competition.[101] In this respect, Croatia fulfils its obligation under the Stabilisation and Association Agreement (hereinafter, SAA) according to which it shall ensure that an operationally independent body is entrusted with the powers necessary for the full application of Article 70(3) SAA or Article 35(1)(i) and (ii) of the Interim Agreement (hereinafter, IA) regarding private and public undertakings and undertakings to which special rights have been granted.[102]

---

[94] Art. 58 new CCL.
[95] See *Annual Report* 2001-2002, p. 12.
[96] Art. 60 new CCL.
[97] Ibid.
[98] See I. Pezo, loc. cit. n. 29, at p. 101.
[99] See the Decisions of the Misdemeanour Court of Zagreb, Nos. 36-12319/98, 36-12310/98 and 318-18129/98.
[100] Art. 28(1) CCL.
[101] Art. 27 CCL.
[102] Art. 35(3) IA (Art. 70(3) SAA).

According to the new CCL, the institutional enforcement concept has not been changed. According to both the old and the new CCL, the Agency has two bodies: the Director and the Council for the Protection of Market Competition (hereinafter, the Council).

The Agency is still the main regulatory antitrust body in Croatia and is responsible to the Croatian Parliament (*Sabor*).[103] The new CCL introduced the idea of the establishment of the Council as a professional body managing the Agency and having adjudicative powers.[104] The Council is composed of five persons that have experience in competition law or other similar disciplines.[105] It decides by a majority of three votes,[106] with the obligation that the President of the Council is present. The President of the Council represents the Agency and manages the organisational work of the Agency. The Council is appointed by the Parliament for a period of five years.[107]

The investigative powers of the Agency are broad. It has the right to demand all the information it requires from undertakings, it can inspect all business premises and all movable and immovable assets owned by the undertaking and it can demand data and information from other persons who, in the opinion of the Agency, may contribute to resolving and explaining certain issues concerning the distortion of free market competition.[108]

The decisions of the Agency are published in the Official Gazette of the Republic of Croatia and in the Official Gazette of the Agency.[109] The Agency submits a complete analysis of the market competition situation in Croatia to the Croatian Parliament in the form of an annual report.[110]

However, the enforcement of competition policy is much more problematic than establishing the necessary legislative framework, and serious efforts are required in this area. The human-resource situation at the Agency urgently needs to be addressed, as does the development of the necessary technical infrastructure. From the beginning of its work until February 2002, the Agency has reached a decision in 1,158 cases.[111] In the last reporting period, the Agency's total completion rate was 83.53 per cent, and it has maintained this high level of efficiency since it was founded in 1997.[112] The staffing of the Agency is consid-

---

[103] Art. 30(1) new CCL.
[104] Art. 35(1) new CCL.
[105] Art. 32(1) new CCL.
[106] Art. 34 new CCL.
[107] Art. 32(2) new CCL.
[108] Art. 34(1) CCL; Arts. 48-50 new CCL.
[109] Art. 37a CCL.
[110] Art. 38 CCL.
[111] See *Annual Report* 2001-2002, p. 12.
[112] See *Annual Report* 2001-2002, p. 28.

ered inadequate due to a lack of qualified people.[113] In 2002, the total staff of the Agency numbered seventeen people, of whom six lawyers and four economists were involved in handling cases.[114] Despite this lack of resources, the Agency's activity has increased substantially: from 61 decisions in 1997 to 346 decisions in 1998 and 627 decisions in 1999. By 2002, 1,481 proceedings had been initiated.[115]

The increase in the enforcement of competition law and the growing complexity of cases make it necessary to develop an improved institutional framework for the Agency that provides for a more efficient enforcement policy and greater independence. The Agency has no competence with regard to public procurement or consumer protection matters, but it does of course protect them indirectly. Regarding administrative capacity, the opinion of the European Commission was that the Agency 'is not fully functional and experiences problems to absorb the intended assistance'.[116]

3.4 **The competence of the Agency with regard to State aid**

Under the Interim Agreement, Croatia assumed the obligation to establish an operationally independent State aid authority by 1 March 2003 and to prepare a regular annual report on State aid. Croatia did not respect this deadline, but soon after enacted the Law on State Aid on 13 March 2003.[117] According to Article 5 of this Law, the Agency for the Protection of Market Competition is responsible for applying this Law. It remains to be seen how successful its implementation will be, since the presence of the State in the economic transition, as well as in Croatia as a whole, is still very substantial and takes the form of implicit subsidies, sponsored contracts and guarantees.[118]

---

[113] Second Annual Report on the Stabilisation and Association Process for South East Europe, COM (2003) 139 final, Working Paper on Croatia, SEC (2003) 341, p. 30.

[114] See *Annual Report* 2001-2002, p. 6.

[115] See *Annual Report* 2001-2002, p. 45.

[116] Second Annual Report on the Stabilisation and Association Process for South East Europe, COM (2003) 139 final, Working Paper on Croatia, SEC (2003) 341, p. 25.

[117] *Zakon o državnim potporama* [Law on State Aid], *Narodne novine* 47/03 of 25 March 2003.

[118] Second Annual Report on the Stabilisation and Association process for South East Europe, COM (2003) 139 final, Working Paper on Croatia, SEC (2003) 341, p. 26.

3.5 The role of the Agency in the Croatian privatisation process

The privatisation process in Croatia generally proceeded at a slow pace.[119] It started with the Law on the Transformation of Socially-Owned Enterprises in 1991.[120] During the first phase, there were no changes in the ownership structure of these enterprises.[121] At this time, there was no implementation of the CCL in Croatia, despite the fact that it was already in force.

Much more important in relation to privatisation was the second phase, which was initiated by the Law on Privatisation in 1996.[122] Its task was to provide regulations for the 'real' privatisation of State-owned companies.[123] As in the first phase, the Agency also had no influence on the privatisation process in the second phase. Although the Agency began its work in February 1997, it did not acquire any right to make decisions regarding the privatisation process. The only right it had in this regard was to issue opinions as to whether the sale of shares in a company to a specific undertaking would result in the creation of prohibited concentration, but only at the request of the Croatian Privatisation Fund or another State authority and institution and not on its own initiative.[124] The above-mentioned institutions were not obliged to make such requests, and the Agency's opinions were not binding for them. This possibility was rarely used in practice.[125] The new CCL no longer contains this provision.

Furthermore, the privatisation of the State monopolies in the oil, electricity, telecommunications and railway sectors was subject to special privatisation laws, like the Law on the Privatisation of INA d.d.[126] and the Law on the Privatisation of *Hrvatske telekomunikacije d.d.*,[127] and was therefore excluded from the scope of the CCL and its merger controls.[128] Consequently, the Agency con-

---

[119] Ibid., at p. 18

[120] *Zakon o pretvorbi društvenih poduzeća* [Law on the Transformation of Undertakings], *Narodne Novine* 19/1991, 4/1992, 83/1992, 16/1993, 94/1993, 2/1994, 9/1995 and 21/1996.

[121] See Siniša Petrović, 'The Legal Regulation of Company Groups in Croatia', 2 *EBOR* (2001) p. 285.

[122] *Zakon o privatizaciji* [Law on Privatisation], *Narodne novine* 21/1996, 71/1997 and 73/2000.

[123] See S. Petrović, loc. cit. n. 121, at p. 285.

[124] Art. 26 CCL.

[125] See *Annual Report* 2001-2002, p. 5.

[126] *Zakon o privatizaciji INA – Industrija nafte d.d.* [Law on the Privatisation of INA d.d. – Oil Industry] of 19 March 2002, *Narodne novine* 32/02 of 28 March 2002.

[127] *Zakon o privatizaciji Hrvatskih telekomunikacija d.d.* [Law on the Privatisation of Croatian Telecom d.d.] of 11 June 1999, *Narodne novine* 65/99 of 25 June 1999.

[128] See the Agency's Opinion in the *Deutsche Telekom AG/Hrvatske telekomunikacije d.d.* privatisation case of 11 September 2001, *Annual Report* 2001-2002, p. 157.

cluded that the cases of privatisation that are regulated by the Law on Privatisation do not fall under the CCL's merger controls, although they meet the necessary conditions.[129]

3.6 Some issues concerning the banking sector

For some aspects of competition in the banking sector, the Croatian National Bank (CNB) is competent. Under the Decision on the Protection of Competition in the Banking Sector, which was passed by the Governor of the CNB, the competence for monitoring competition in the banking sector and initiating procedures in response to the infringement thereof was given to the CNB.[130] The Agency has therefore lost its competence with regard to agreements restricting competition, abuse of dominant position and mergers in the banking sector (Arts. 2, 4 and 6 of the Decision). The CNB will inform the Agency regarding every decision it takes within six days of its release. It can also ask the Agency for its opinion if certain behaviour could have a significant impact on other economic sectors. The decisions of the CNB will also be published in the Official Gazette.

3.7 Other regulatory authorities

Apart from the Agency, a few special regulatory authorities were established in certain economic sectors. The Telecommunications Council[131] is responsible for the regulation of the telecommunications market, while the Council for the Regulation of Energy Activities[132] is responsible for the energy sector. Until the establishment of these regulatory authorities, the Agency performed all the activities in connection with the protection of competition in the relevant markets. Now these competences are divided between the Agency and the authorities. The Energy Council and the Telecommunications Council did not start operating until the beginning of 2002.[133]

---

[129] See e.g. the *European Bank for Reconstruction and Development and Kärtner Landes- und Hypothekenbank AG* case, *Annual Report* 2001-2002, p. 136. See also the Agency's answer to the question of a member of Parliament in *Annual Report* 2001-2002, p. 156.

[130] *Odluka Hrvatske narodne banke o zastiti tržišnog natjecanja unutar bankarskog sektora* [Decision of the Croatian National Bank on Competition in the Banking Sector] of 26 March 2003, *Narodne novine* 48/2003.

[131] The Council was founded according to *Zakon o telekomunikacijama* [Law on Telecommunications], *Narodne novine* 76/99, 128/99, 68/2001 and 122/2003.

[132] The Council was founded according to *Zakon o regulaciji energetskih djelatnosti* [Law on the Regulation of Energy Activities], *Narodne novine* 68/2001 of 27 July 2001.

[133] See S. Petrović, 'Tržišno natjecanje – pravni aspekti' [Legal Aspects of Market Competition], in Ministry for Eurpean Integration, *Prilagodbe politikama unutarnjeg tržišta EU: očekivani učinc*i [Adaptation to Internal Market Policies: Expected Results] (Zagreb 2002) p. 52.

4. Competition provisions in the EC-Croatia Stabilisation and Association Agreement

4.1 Introduction

The Stabilisation and Association Agreement between EC and Croatia was signed on 29 October 2001. As a mixed agreement, the SAA needs to be ratified by all the Member States of the EC as well as the Croatian Parliament.[134] This caused considerable delay with regard to its entry into force and explains the parallel signature of the Interim Agreement.[135] The Interim Agreement entered into force according to Article 53 IA (Art. 129 SAA) on 1 March 2002.[136] Its purpose is to implement the provisions on trade and trade-related matters as speedily as possible.[137]

The SAA covers a wide range of subjects, such as trade liberalisation, intensive political dialogue between the parties, the fostering of regional cooperation in all fields covered by the SAA, the free movement of goods, capital, services and persons, safeguard clauses, institutional questions and competition policy. A free-trade area between the EC and Croatia will be established over a period lasting a maximum of six years from the entry into force of the Interim Agreement.[138] Special attention should therefore be paid to the enforcement of the competition law provisions. This is important not only for establishing a level playing field for business throughout the EU, but also for consumers, innovation, competitiveness and sustainable growth of the Croatian economy. The enforcement of competition provisions should stimulate the integration of the relevant economies. Moreover, it is the key element of the integration process.

---

[134] The Croatian Parliament ratified the SAA by qualified majority on 5 December 2001, *Narodne novine – medjunarodni ugovori* [International Treaties] 14/2001.

[135] Council Decision 2002/107/EC of 28 January 2002 on the conclusion of an Interim Agreement on trade and trade-related matters between the European Community, of the one part, and the Republic of Croatia, of the other part – Information on the entry into force of the Interim Agreement on trade and trade-related matters between the European Community and Croatia, *OJ* 2002 L 40/9.

[136] Art. 3(2) IA; *Zakon o potvrdjivanju Privremenog sporazuma o trgovinskim i s njima povezanim pitanjima izmedju Republika Hrvatske i Europske zajednice* [Law on the Ratification of the Interim Treaty on Trade and Trade-Related Matters between the Republic of Croatia and the European Union], *Narodne novine – medjunarodni ugovori* [International Treaties] 15/01.

[137] See the Preamble of the Interim Agreement.

[138] Art. 2 IA (Art. 15 SAA).

The SAA contains an evolutionary clause according to which Croatia may become a candidate for EU membership and also a full member of the EU in the long run, if the membership conditions determined by the Maastricht Treaty and the Copenhagen criteria are fulfilled and subject to regional cooperation and the successful implementation of the Agreement.[139]

4.2 Obligations regarding the approximation of laws

According to the Article 69(1) SAA, Croatia shall endeavour to ensure that its existing laws and future legislation will be gradually made compatible with the Community *acquis*. However, since the *acquis* in the field of competition law consists primarily of norms and rules that apply directly, the *acquis* in this field will apply from the moment of accession. From the point of view of accession, it is therefore rather important to adjust to EC competition law.[140] There are two important reasons for this. First, competition is an essential element of the economic transition and a free-market economy. Second, there is a need to establish and maintain a level playing field for competition between undertakings operating in the European internal market.

4.3 Competition provisions in the SAA

The SAA is divided into ten titles. Article 70 SAA (Competition and other economic provisions) under Title VI (Approximation of laws, law enforcement and competition rules) also appears in Article 35 IA under Title III (Payments, competition and other economic provisions). Article 70(1) and (2) SAA and Article 35(1) and (2) IA read as follows:

> '1. The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and Croatia:
> (i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;
> (ii) abuse by one or more undertakings of a dominant position in the territories of the Community or of Croatia as a whole or in a substantial part thereof;
> (iii) any State aid which distorts or threatens to distort competition by favouring certain undertakings or certain products.
> 2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community,

---

[139] See clause 15 of the Preamble of the SAA. Croatia submitted its application for EU membership on the basis of Art. 49 EC on 21 February 2003.

[140] See John Fingelton, et al., *Competition Policy and the Transformation of Central Europe* (Brussels, CEPR 1996) p. 179.

in particular from Articles 81, 82, 86 and 87 of the Treaty establishing the European Community and interpretative instruments adopted by the Community institutions.'

4.4 The enforcement of the competition provisions

There is a difference between the competition rules in the SAA and the competition rules contained in Articles 63 to 67 of the Europe Agreements.[141] There is no rule in the SAA requiring the adaptation of implementation rules as in the case of the Europe Agreements.[142] According to the doctrine, the competition provisions of the Europe Agreements do not have direct effect as long the implementation rules are not enforced.[143] It can therefore be concluded that the competition provisions of the SAA do have direct effect.

The cases that fall under Article 70(1) SAA will be analysed in relation to the substantive provisions of the CCL, including prohibitions and sanctions. The obligation to take account of the legal criteria contained in Articles 81, 82, 86 and 87 means that the criteria flowing from the application of those articles have to be taken into account by the Agency as interpretative tools in the application of the substantive law provisions of the CCL in cases that fall within the scope of the SAA. The aim is that EC law criteria become properly effective in Croatian law.

In Article 70(2) SAA (Arts. 27 and 35 IA), the Agency sees the right to apply EC competition criteria when there are no solutions in the Croatian legislative framework as well when the competitive behaviour does not affect the trade between Croatia and EC.[144] The new CCL contains a clause that explicitly obliges the Council to assess the competition behaviour that falls within the scope of the SAA according to the criteria arising from EC competition law.[145]

If one of the Parties to the Interim Agreement considers that a particular practice is incompatible with the terms of Article 35(1) IA, it may take appropriate measures after consultation within the Interim Committee or after thirty working days following referral for such consultation.[146] Apart from this, the Interim Committee has the power to take binding decisions within the scope of the In-

---

[141] See e.g. the EC-Poland Europe Agreement, *OJ* 1993 L 348/2.

[142] See the Implementing Rules for the EC-Poland Europe Agreement, *OJ* 1996 L 208/24.

[143] The Europe Agreements or Association Agreements were signed between the European Communities and the Candidate States in 1992. They entered into force on 1 February 1994. The bulk of these agreements are identical, but the bilateral agreement with Poland contains a few more provisions concerning the direct effect of its competition provisions. See Gabrielle Marceau, 'The Full Potential of the Europe Agreements: Trade and Competition Issues – The Case of Poland', 19(2) *World Competition* (1995) pp. 35-69 at p. 44.

[144] See the *Zagrebačka pivovara d.d.* case of 30 April 2003, *Narodne novine* 72/2003.

[145] Art. 35(3) new CCL.

[146] Art. 35(9) IA.

terim Agreement, in the cases provided for therein. The decisions shall be binding on the Parties, which shall take the measures necessary to implement them.[147]

In EC law the situation is as follows. The ECJ has ruled that certain provisions of the agreements between the EC and third countries can have direct effect in the EC. The ECJ recognised the direct effect of a provision of an Association Agreement in *Bresciani*,[148] and expanded its reasoning in *Kupferberg*[149] and *Demirel*,[150] in which three safeguard principles from *Kupferberg* were confirmed: the 'purpose and nature of the agreement', the question whether the obligation is 'clear and precise' and the question whether it is 'not subject, in its implementation and effects, to the adoption of any subsequent measure'. However, there has not yet been a judgment regarding the question whether the competition rules in the Europe Agreements themselves have direct effect.[151]

5. Concluding remarks

In the six years of the CCL's enforcement, it is possible to notice its consistent development. The Agency strives towards the permanent adjustment of the legislation and its enforcement principles to the requirements of the development and protection of competition. The legislative framework has been gradually adjusted to EC competition rules. In the areas of antitrust and merger control, there are improvements in the new legislative framework. Since the future EC competition law system implementing Articles 81 and 82 EC will be more decentralised,[152] Croatia must already reflect on the appropriate legislative framework for the time after the entry into force of the EC competition law's own modernisation. In addition, the necessary legislative framework should be in place, the necessary administrative capacity should be established and the country should show a credible enforcement record with regard to the competition *acquis*.[153]

The EC has to be sure that the judiciary is well trained for its future task of applying the competition rules. Although there may be some understandable concerns about opening the domestic market to competition too quickly, there

---

147 Art. 39 IA.

148 ECJ, Case 87/75 *Bresciani* v. *Italian Finance Department* [1976] *ECR* 129.

149 ECJ, Case 104/81 *Hauptzollamt Mainz* v. *Kupferburg* [1982] *ECR* 3641.

150 ECJ, Case 12/86 *Meryen Demirel* v. *Stadt Schwabisch Gmund* [1987] *ECR* 3719.

151 See R. Whish, op. cit. n. 76, at p. 55.

152 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty, *OJ* 2003 L 1/1.

153 See Pons, 'Enlargement and Competition Policy', Meeting of EPP-ED Group Bureau in Ljubljana, 16 September 2002, available at <http://europa.eu.int/competition/speeches>.

is no reason for delays in the adoption and enforcement of the standards of EC competition law. This should permit the Agency to prevent undertakings that are active in the domestic market from abusing their economic power to the detriment of consumers and society as a whole. It is important that Croatia redoubles its efforts to promote competitive markets and control the exercise of market power, regardless of any desire to promote its integration into the EU.[154]

In conclusion, it may be noted that the CCL shares the following main characteristics with EC competition law:

- it regulates the same three anticompetitive strategies: agreements restricting competition, abuse of dominant market position and anticompetitive mergers;
- it generally prohibits both horizontal and vertical restraints of competition, but individual and group exemptions are allowed;
- it absolutely prohibits abuse of the dominant market position;
- its merger controls have a preventive character;
- the Agency is an independent administrative authority with strong investigative powers; and
- the Agency's decisions are subject to the control of an independent High Administrative Court.

There is a difference between the CCL and EC competition law in that the Misdemeanour Courts, rather than the Agency, can impose fines.

[154] A. Mayhew, op. cit. n. 69, at p. 117.