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Global Legal Group

The International Comparative Legal Guide to:

Merger Control 2010

A practical insight to cross-border Merger Control issues

Published by Global Legal Group with contributions from:

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Chapter 12

Croatia

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The general authority for merger control in the Republic of Croatia is the Croatian Competition Agency (hereinafter "the Agency").

However, in some particular sectors there are other relevant authorities. These are as follows:

The Croatian Financial Services Supervisory Agency (hereinafter: "the CFSSA") supervises acquisitions of investment funds as well as investment companies.

The Croatian Post and Electronic Communications Agency renders preliminary opinions in the cases of a merger on the telecommunication market.

The merger control of banks is exercised also by the Croatian National Bank.

1.2 What is the merger legislation?

The merger control legislation is set out in the Competition Act (Official Gazette no. 122/2003). This Act holds substantive and procedural provisions. The Croatian Parliament recently adopted new Competition Act (Official Gazette 79/2009), however, the new act will enter into force only on 1 October 2010. The new act will introduce substantial changes in the procedure before the Agency, and broaden significantly the scope of the Agency's authority.

Subsidiary law with respect to the proceedings before the Agency is the General Administrative Proceedings Act (Official Gazette No. 53/91). New Administrative Proceedings Act (Official Gazette 47/09) has also been recently adopted, and shall come into force on 1 January 2010.

For appeal proceedings before the Administrative Court, the Administrative Disputes Act applies.

There are also various pieces of legislation including provisions applicable to the merger process. These are:

- The Companies Act (Official Gazette the Company Act (Official Gazette 111/93, 34/99, 52/00, 118/03, 107/07, 146/08);
- The Capital Market Law (Official Gazette 88/08, 46/08, 74/09);
- The Law on Takeover of Joint Stock Companies (Official Gazette 109/07, 36/09); (hereinafter The Takeover Law);
- The Labor Act (Official Gazette 38/95, 54/95, 64/95, 17/01, 82/01, 114/03, 30/04, 142/03, 137/04);
- The Civil Code (Official Gazette 35/05, 41/08);
- The Investment Promotion Law (official Gazette 138/06); and
- The Law on Electronic Communications (official Gazette 73/08).

Pursuant to Article 70.2 of the Stabilisation and Association Agreement between the Republic of Croatia and the European Communities and its Member States (SAA) Croatian rules regarding competition are to be applied and interpreted in accordance with the rules, measures, and principles of the competition law of the European Union. Accordingly, the Competition Act in Article 35 prescribes that in the assessment of different forms of prevention, restriction or distortion of competition that may affect trade between the Republic of Croatia and EC, the Agency (the Council of the Agency as the authorised body) shall apply the criteria arising from the correct application of the competition rules of the EU.

1.3 Is there any other relevant legislation for foreign mergers?

Croatian law does not discriminate towards foreign investors, whether legal or natural person, and as a principle, offers them equal treatment as Croatian investors.

The principle of equal treatment is prescribed by the Constitution of the Republic of Croatia, which provides that "....rights acquired by investment of capital shall not be restricted by law or any other legal act" and "....foreign investors shall be granted free transfer and repatriation of profit and the capital invested".

However, all direct foreign investments (not only in equity, e.g. subordinated loans are also qualified as such) should be reported to the Croatian National Bank within 30 days upon completion of the transaction. Since this subsequent reporting is envisaged merely for statistical purposes (balance of payment of the Republic of Croatia, calculation of foreign debt) no clearance/approval by the said regulator is required.

1.4 Is there any other relevant legislation for mergers in particular sectors?

Merger control instruments exist with respect to several industries being "usual suspects" in many jurisdictions.

In financial services, companies must hold licences issued by the respective regulators. Transfer of shares of banks, pension funds and insurance companies is subject to prior approval of the regulator as well. The CFSSA supervises acquisitions of investment funds as well as investment companies.

Under the Energy Act, all potential energy undertakings should

receive a licence issued by the regulator in charge.

In the field of telecommunications, the Law on Electronic Communications prescribes the obligation of the operators and service providers to obtain the opinion issued by the Croatian Post and Electronic Communications Agency on the possible impact of the concentration on the respected market, and submit it to the Agency.

The transfer of shares in broadcasting should be approved both by the respective regulator and the Agency. Media companies are bound by specific merger control requirements with respect to concentration. Namely, pursuant to the Law on Media, public informing companies are always obliged to submit the application of merger control, notwithstanding the thresholds mentioned below in question 2.4.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught - in particular, how is the concept of "control" defined?

The Competition Act adopts the notion of concentration that occurs by:

- mergers or acquisitions of undertakings; and
- acquisition of control or prevailing influence by one or more undertakings over one or more undertakings or a part of undertaking, in particular by:
  - acquisition of majority shares;
  - acquisition of majority voting rights; or
  - in any other way according to the provisions of the Companies Act and other regulations.

An undertaking is deemed to be under the control of another undertaking if the "controlling undertaking" with respect to the "controlled undertaking", directly or indirectly:

- holds more than half of the shares;
- may exercise more than half of the voting rights;
- has the right to appoint more than half of the members of the management board, supervisory board or similar managing or supervising body; or
- in any other way exercises a decisive influence on its business.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Acquisition of any minority interest is caught by merger control if such an acquisition would provide the acquiring undertaking with any of the controlling possibilities as defined above in question 2.1 (such as the appointment of more than half of the management board members).

2.3 Are joint ventures subject to merger control?

A joint venture performing functions of an independent economic unit on a lasting basis constitutes a concentration, within the meaning provided by the Competition Act. This notion of a joint venture subject to merger control corresponds to the "full function joint venture" under the EC Merger Regulation.

A joint venture with the objective to co-ordinate competition among undertakings that remain independent does not constitute a concentration and shall be assessed according to the Competition Act provisions regarding agreements.

The threshold for application of merger control to a joint venture is the same as in the standard cases of concentration.

2.4 What are the jurisdictional thresholds for application of merger control?

The parties to the concentration are obliged to notify the concentration to the Agency if the following conditions are cumulatively met:

- the total turnover of all undertakings - parties to the concentration, arising out of the sale of goods and/or services worldwide, amounts to at least 1 billion HRK (approximately 137.92 mil Euro) in the financial year preceding the concentration; and
- the total turnover of each of at least two parties to the concentration arising out of the sale of goods and/or services in the domestic market, amounts to at least 100,000,000.00 HRK (approximately 13.79 mil Euro) in the financial year preceding the concentration.

The total turnover referred to above is to be calculated taking into account the turnovers of all the associated companies of the undertaking (on the group level) acquiring the control or prevailing influence in the concentration save the turnover arising out of the sale of goods and/or services among the companies within the group.

With respect to the seller - undertaking, if the concentration consists of a merger or acquisition of a part or parts of one or more undertakings, irrespective of whether those parts are constituted as legal entities, the calculation of the turnover includes only the turnover deriving from the parts being the subject of the concentration. However, two or more transactions regarding this "acquisition of parts of undertaking" effected within a two-year period shall be considered to constitute one concentration, effected on the day of the last transaction.

2.5 Does merger control apply in the absence of a substantive overlap?

Merger control is applicable subject to the thresholds described under question 2.4 above. No substantive overlap is required for merger control to apply.

2.6 In what circumstances is it likely that transactions between parties outside Croatia ("foreign to foreign" transactions) would be caught by your merger control legislation?

The Competition Act applies to legal and natural persons with their seat and residence abroad, if their participation in the trade of goods and/or services affects the domestic market.

For this condition to be fulfilled it is not necessary that foreign parties have Croatian subsidiaries. It will suffice that all the parties to the concentration are present in the Croatian market through sale of goods and/or services, provided that each party to the concentration has achieved total turnover in the Croatian market of at least 100,000,000.00 HRK (approximately 13.79 mil Euro) in the financial year preceding the concentration.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

With respect to media mergers the notification to the Agency is obligatory irrespective of the jurisdictional thresholds.

With respect to banks no merger can be performed without the consent of the National Bank irrespective of the Competition Act thresholds.

The CFSSA supervises acquisitions of investment funds as well as the investment companies.

See also question 1.4 above.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

The Competition Act has special provisions for the case when the concentration is based on a merger of a part or parts of one or more undertakings, irrespective of whether those parts are constituted as legal entities. Two or more such transactions which take place within a two-year period are considered to constitute one single concentration. However, it is important to note that this provision refers only to the method for calculation of the total turnover of the parties to the concentration.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Where the jurisdictional thresholds are met, the notification to the Agency is compulsory. The intention to concentrate has to be notified immediately, and at the latest within eight days after the public offer is made or the agreement is signed, whatever occurs earlier.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

There are no exceptions.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

When a concentration is effected without due notification and clearance, and this concentration has led to the prevention, restriction or distortion of competition, according to the Competition Act the Agency shall propose all indispensable measures aimed at restoring efficient competition in the relevant market, particularly it can issue a ruling by which it can:

- order for shares or share capital acquired to be transferred or divested; or
- prohibit or restrict the realisation of voting rights attached to the shares or share capital of the undertakings - parties to the concentration, and order the joint venture or any other form of control by which a prohibited concentration has been put into effect to be terminated.

The fine for not filing a notification on the concentration intention or for filing false data consists of:

- a fine amounting to no more than 1% of the value of total annual turnover in the financial year preceding the year when the infringement was committed; and
- a fine for the responsible person within the undertaking to the amount of 15,000.00 to 50,000.00 HRK.

The transaction that has not been cleared is valid unless the Agency finds that it substantially impedes competition and takes measures (described here above) to protect free market competition.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

It is not possible to carve out local completion of a merger to avoid delaying global completion. When the notification to the Agency is made, the concentration parties have to notify whether they have or plan to notify any other authority outside Croatia regarding the respective concentration, and if any other authority has assessed such a concentration, they are to deliver such a decision to the Agency.

3.5 At what stage in the transaction timetable can the notification be filed?

The intention to concentrate has to be notified immediately, and at the latest within 8 days after the public offer is announced or the agreement is entered into, whatever event occurs earlier.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

The Agency should issue and deliver to the notifying party a decision on the initiation of the concentration assessment proceedings within 30 days following the receipt of the complete notice. If such a decision is not delivered to the notifying party within this timeframe, the concentration is deemed cleared.

If the Agency finds that the concentration might have the effect of considerable prevention, restriction or distortion of competition in the relevant market, it shall issue the decision on the initiation of the concentration assessment proceedings. The timeframe for these second stage proceedings is three months. Within this timeframe the Agency should rule the concentration allowed, prohibited, or conditionally allowed (subject to certain conditions and measures prescribed by the Agency).

The Agency may extend the second stage proceedings deadline for a subsequent period of three months in cases where it is necessary to carry out additional expertise or analyses of evidence and facts, or where delicate industries or markets are concerned. The Agency has the obligation to inform the concerned parties about this extension of the deadline before the expiry of the prescribed time limit.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

When the notification is filed with the Agency it is prohibited for all of the parties to complete the concentration transaction, until the Agency has taken the final decision authorising it, or until the compulsory waiting period of 30 days has ended.

The undertaking shall be fined a maximum of 10% of the total annual turnover in the financial year preceding the year when the infringement was committed, if it participates in prohibited concentration of undertakings or fails to act in accordance with the decision of the Agency regarding the concentration. The responsible person within the undertaking shall also be fined for such infringement in the amount of 50,000.00 to 200,000.00 HRK.

3.8 Where notification is required, is there a prescribed format?

The form for the notification is prescribed by the Regulation on notification and criteria for concentrations assessment.

The concentration notification should be accompanied by:

- the original or a certified copy or a certified translation (if the original is not in Croatian) of the document representing the legal grounds for the concentration;
- annual financial reports for the parties to the concentration for the financial year preceding the concentration; and
- other data required by the concentrations regulation.

When notifying the concentration, the party is obliged to state whether it has submitted or intends to submit the request for clearance to some other body authorised to assess concentrations outside the territory of the Republic of Croatia, and, if any such body has rendered a decision with respect to the concentration, it is obliged to deliver such a decision to the Agency.

The Agency shall issue a confirmation on the receipt of the concentration notification when it receives all documentation and data stated above, and the date of such confirmation is the day from which all proceedings and relevant deadlines are calculated.

It is not the practice that any pre-notification discussion with the Agency be held.

3.9 Is there a short form or accelerated procedure for any types of mergers?

The applicable legislation in Croatia does not provide a possibility for any kind of accelerated procedure or short form for any types of mergers different from the uniform procedure described above in question 3.6.

3.10 Who is responsible for making the notification and are there any filing fees?

The parties to the concentration are responsible to file the notification with the Agency. They can make a joint filing.

The fees for clearance are administrative fees, and amount to a maximum of 255,000.00 HRK.

The Bylaw on administrative fees (Official Gazette No. 141/2004) prescribes the exact amount of fees in the process of notification.

Notification fees are as follows:

a) notification under special laws, in the cases when there is obligation to file the notification with the Agency notwithstanding the thresholds mentioned in question 2.4 - 5,000.00 HRK;

b) notification when thresholds mentioned in question 2.4 are fulfilled - 10,000.00 HRK;

c) if one of the parties requires a special resolution stating that the concentration has been deemed allowed (I level), an additional fee in the amount of 10,000.00 HRK is to be paid; and

d) in the circumstances mentioned under question 3.6 (if the Agency finds that the concentration might have the effect of considerable prevention, restriction or distortion of competition in the relevant market) (II level), the fee for the Agency's decision is 150,000.00 HRK.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

According to the Competition Act, concentrations are prohibited when they create or strengthen the dominant position of one or more undertakings, individually or jointly, if they can substantially impede, restrict or distort the competition, unless concentration participants provide valid evidence that the concentration will actually lead to strengthening of competition in the market, with benefits that will prevail over negative effects of creation or strengthening dominant position.

4.2 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Third parties are entitled to participate in the regulatory scrutiny process provided they are able to prove a qualified, legal interest (e.g. the outcome of the process - merger would adversely affect their business). However, such a participant is not given access to documents containing sensitive data or business secrets of the parties, internal memos of the Agency and correspondence with EC (if any).

4.3 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

If the undertaking submits to the Agency incorrect or untrue information in the concentration assessment proceedings or fails to act according to the decision of the Agency, it shall be fined with a maximum of 1% of the value of its total annual turnover in the financial year preceding the year when the infringement was committed. In such an event, the responsible person of the undertaking (legal person) shall also be fined in the amount of 15,000.00 to 50,000.00 HRK.

The undertaking that is not a party to the proceedings before the Agency shall be fined for the infringement in the amount of 15,000.00 to 50,000.00 HRK if it fails to act upon the request of the Agency. A responsible person of the legal person in question shall also be fined in the amount of 5,000.00 to 10,000.00 HRK.

A natural person that is not a party to the proceedings before the Agency and that fails to act according to the request of the Agency shall be fined for the infringement in amount of 5,000.00 to 10,000.00 HRK.

If a fine is to be imposed upon an infringer the Agency shall propose such ruling to the misdemeanour court that will then take a decision on the matter. The misdemeanour proceedings should be started within the period of 3 years from the infringement of the Competition Act.

4.4 During the regulatory process, what provision is there for the protection of commercially sensitive information?

The employees of the Agency shall keep and not disclose the information classified as an official secret, irrespective of the way they came to know it, and this obligation shall continue to be in effect after the expiry of their engagement with the Agency.

The term "official secret" includes the following:

- all data and documentation defined to be an official secret by law or other regulations;

- data defined to be an official or business secret on the basis of an act of the undertakings in the ownership of the state (or regional/local government) or incumbent operators; and
- correspondence with the European Commission and other authorities of the European Communities.

The parties to the proceedings before the Agency have the right of access to the respective files, save the official secret data.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

The regulatory process ends with the expiration of the 30-day period after the notification, when it is considered that the respective concentration is cleared, or by the ruling of the Agency which states the concentration allowed, prohibited, or conditionally allowed (subject to certain conditions and measures prescribed by the Agency).

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

It is not possible to negotiate remedies with the Agency.

However, the Agency can decide that the concentration can be conditionally allowed, subject to fulfilment of conditions and measures prescribed by the Agency.

5.3 At what stage in the process can the negotiation of remedies be commenced?

See question 5.2 above.

The Agency issues the ruling on conditionally allowed concentration after the second stage of in-depth concentration assessment.

5.4 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

Where the Agency considers that the implementation of the respective concentration could have as its effect considerable prevention, restriction or distortion of competition in the relevant market, it will order the initiation of the proceedings for the purpose of evaluating the compatibility of the concentration (phase II). Within phase II, the Agency may decide that the concentration is conditionally compatible, provided that certain measures are observed and conditions met. In such case, the Agency will, in its decision evaluating the proposed concentration as conditionally compatible, impose upon the parties measures and conditions intended to ensure the compliance, and determine time limits within which these measure and conditions have to be satisfied.

In making its decision on terms and condition to be imposed, the Agency has an individual approach, paying regard to particularities of each case.

In cases when a divestment remedy is required by the concentration decision, it is standard for the Agency to prescribe relatively short deadlines for execution of divestment. The object of divestment is often overlapping activities of the concentration parties. It is not uncommon for the Agency to prescribe certain requirements to be met by potential acquires of the divested undertakings.

Divestment remedy can be subject to additional terms and conditions, as decided by the Agency on a case-by-case basis.

5.5 Can the parties complete the merger before the remedies have been complied with?

In principle, the parties to the concentration cannot complete the merger before they meet all the conditions prescribed by the Agency. Namely, the Agency can conditionally allow the planned concentration, pending fulfilment of all the remedies imposed by the Agency in its decision. In such cases the fulfilment of the remedies is a condition to completion of the transaction.

Exceptionally, the Competition Act prescribes that the Agency can, for especially justified reasons, authorise the parties to the concentration to proceed with the action needed for executing the transaction even before the remedies have been complied.

5.6 How are any negotiated remedies enforced?

See question 5.2 above.

The ruling of the Agency will contain the specific consequences of not complying with the imposed remedies. Further, non-compliance with the Agency ruling has general consequences as described in questions 3.3 and 3.7 herein.

5.7 Will a clearance decision cover ancillary restrictions?

According to the Competition Act, the otherwise forbidden concentration can be cleared if the concentration parties can prove that the concentration shall lead to improved competition that will have greater benefits than the negative effects of the created or strengthened dominant position.

If the Agency believes that the concentration might substantially impede the competition in the respective market, it will start the proceedings on the concentration assessment, and decide whether the concentration is allowed.

In case the Agency clears the concentration with potential impediment to competition it does not prejudice later competition proceedings.

5.8 Can a decision on merger clearance be appealed?

Decisions of the Agency are subject to an appeal to the Administrative Court according to the Administrative Disputes Act. This appeal is the full appeal on the merits.

5.9 Is there a time limit for enforcement of merger control legislation?

The limitation period for the Agency to take action before the misdemeanour court is three years from the infringement. This period is broken by every action of the Agency aimed against the infringer; however the absolute limitation period is six years after the infringement.

6 Miscellaneous

6.1 To what extent does the merger authority in Croatia liaise with those in other jurisdictions?

The Agency is a member of the International Competition Network.

As mentioned under question 1.2 above, Croatian rules regarding competition are to be applied and interpreted in accordance with the rules, measures, and principles of the competition law of the European Union.

6.2 Please identify the date as at which your answers are up to date.

10 July 2009.

IMPORTANT NOTE

As stated above in question 1.2, a new Competition Act has been recently adopted by the Croatian Parliament. The new Competition Act will bring about significant changes in the merger control procedure. However, the application of the new Act is postponed until 1 October 2010, and until then the current Competition Act remains in force.

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