Croatia

Luka Čolić and Borna Dejanović
Wolf Theiss

LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Merger control, as well as other aspects of competition law, has been substantially governed by the Competition Act, which entered into force on 1 October 2010. In addition, there are numerous regulations that set out the procedural framework and define the standards for its application. One of the most relevant regulations is the Regulation on the Notification and Assessment of Concentrations (Official Gazette 38/11), which provides information on the content and form of the notification and the assessment criteria for concentrations. In preparation for Croatia's accession to the EU on 1 July 2013, the Competition Act was substantially amended to comply with EU competition law. The Competition Act was most recently amended on 24 April 2021, primarily for the purposes of transposing EU Directive 2019/1 (ECN+ Directive) into Croatian law, but also introducing additional changes to the merger control regime.

Since Croatia's accession to the European Union, the EU Merger Regulation (EUMR) has been directly applicable. Hence, mergers falling within the scope of the EUMR are reviewed by the European Commission (one-stop-shop principle) and not by the Croatian Competition Agency (CCA), except for those cases in which the European Commission decides to refer the assessment of a particular concentration to the CCA under the terms of the EUMR. The CCA, at the same time, remains competent to review national merger control cases under the Competition Act, as further described below. The CCA is an independent authority. The decision-making body within the CCA is the Competition Council (the Council), which consists of five members, one of whom is the president of the Council.

More information about the CCA and its activities can be found at www.aztn.hr.

Scope of legislation

2 | What kinds of mergers are caught?

A concentration is constituted by:

- a merger of two or more independent undertakings or parts thereof;
- the acquisition of control or decisive influence of one or more undertakings over one or more other undertakings or a part of an undertaking, in particular by:
  - acquisition of the majority of shares or share capital;
  - obtaining the majority of voting rights; or
  - in any other way according to the provisions of the Croatian Companies Act; or
- the creation of a joint venture by two or more independent undertakings, performing on a lasting basis all the functions of an autonomous economic entity.

A concentration does not arise if:

- banks or other financial institutions, investment funds or insurance companies, in their ordinary course of business, which includes transactions and dealing with securities, for their own account or for the account of third parties, hold shares on a temporary basis with a view toward reselling them, provided that they do not exercise their voting rights in respect of those shares for the purpose of determining the competitive behaviour of that undertaking (ie, they exercise such voting rights solely with a view toward preparing the disposal of the entire or a part of the undertaking or its shares, do not undertake any operation that may distort, restrict or prevent competition, and carry out the disposal within one year following the acquisition). If the disposal is not reasonably possible within this period, it may – upon request – be extended by the CCA;
- the acquisition of shares or share capital is the result of internal restructuring of an undertaking (intra-group merger); or
- control is acquired by an office holder or administrative officer in the event of a bankruptcy, liquidation or winding up of an undertaking in accordance with the bankruptcy laws and the Croatian Companies Act.

3 | What types of joint ventures are caught?

The creation of a joint venture by two or more independent undertakings, performing on a lasting basis all the functions of an autonomous economic entity (full-function joint venture), constitutes a concentration.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

In general, 'control' may be obtained through the transfer of rights, contracts or other means, by which one or more undertakings, either separately or jointly, taking into account all legal and factual circumstances, gain the ability to exercise decisive influence over one or more undertakings on a lasting basis.

An undertaking is deemed to be controlled by another undertaking if the controlling undertaking, directly or indirectly:

- holds more than half of the share capital or 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 committee or a similar administrative or managing body; or
- has the right to manage the business operations of the undertaking in another way, on the basis of a special agreement on the functioning of the undertaking, by which the possibility of exercising decisive influence on a more permanent basis is acquired.

Minority interests (including board or management representation and contractual arrangements) are caught, provided they confer control by any means described above.

Thresholds, triggers and approvals

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

The CCA must be notified of a concentration where in the business year preceding the concentration:

- the combined total worldwide business turnover of the undertakings concerned amounted to at least 1 billion kunas and at least one of the undertakings concerned has its seat or a subsidiary in Croatia; and
- the individual total business turnover realised in Croatia by each of at least two undertakings concerned amounted to at least 100 million kunas.

For the purpose of turnover calculation, the revenues from the sale of goods or the provision of services have to be taken into account. The turnover of an undertaking concerned includes:

1 the turnover of the undertaking concerned;
2 those undertakings in which the undertaking concerned, directly or indirectly owns more than half the shares or capital or business assets, or has the power to exercise more than half the voting rights, or has the power to appoint more than half of the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or has the right to manage the undertakings' affairs;
3 those undertakings that have in the undertaking concerned (acquiring or controlling undertaking) rights or powers listed in item (2);
4 those undertakings in which the undertakings referred to in item (3) have the rights or powers listed in item (2); and
5 those undertakings in which two or more undertakings as referred to in items (1) to (4) jointly have the rights or powers listed in item (2).

Turnover generated by sales or services between companies belonging to the same group, as well as turnover arising from taxes and parafiscal contributions, is not taken into account. In the case of an acquisition of one or more parts of an undertaking or of a group of undertakings, irrespective of whether such parts constitute independent legal entities, only the turnover pertaining to the parts subject to the concentration are taken into account for the purpose of the turnover calculation.

For the purpose of the turnover calculation of banks and other institutions that provide financial services, after the deduction of indirect taxes related to them, the sum of the following income items has to be taken into account:

- income from interest rates and similar income;
- income from securities (ie, income from shares and other variable yield securities, income from participating interests in economic entities, and income from shares in affiliated economic entities);
- commissions receivable;
- net profit on financial operations; and
- other operating income.

For insurance companies and companies that perform reinsurance activities, the value of the gross premiums, which includes amounts paid and received in relation to the insurance contracts issued by or on behalf of an insurance company, including reinsurance premiums, after the deduction of taxes and parafiscal contributions charged by reference to the amounts of individual premiums or in relation to the total premium volume, have to be taken into account.

Concentrations falling within the jurisdiction of the European Commission are, in general, not subject to Croatian merger control (one-stop-shop principle). According to article 19, paragraph 7 of the Competition Act, the European Commission may, however, decide to refer the assessment of a concentration to the CCA, irrespective of the concentration having a Community dimension and regardless of whether the Croatian national thresholds are met (since the higher turnover thresholds stipulated by the EUMR are met). Should this be the case, the parties to the concentration must submit a respective Croatian merger notification to the CCA within 30 days of the date of receipt of the relevant decision of the Commission.

Irrespective of whether the above-mentioned turnover thresholds are met, in specific situations in the media, postal or electronic communications sectors a filing with the CCA or the Croatian Regulatory Authority for Network Industries (HAKOM) may be required.

Except the situations described above, the general rule is that there is no obligation to notify the merger to the CCA if the thresholds from article 17 of the Competition Act are not met.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

If a transaction constitutes a concentration within the meaning of the Act, and if the statutory turnover threshold requirements are cumulatively met, the filing is mandatory.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

The Competition Act requires local effects insofar that – in addition to a certain domestic minimum turnover generated by at least two of the undertakings concerned – at least one of the undertakings concerned is required to have its seat or a subsidiary in Croatia. As a result, purely foreign-to-foreign mergers usually fall outside of the scope of the CCA's jurisdiction.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

There are no provisions that would relate specifically to foreign investments. Inter alia, in the following sectors, provisions related to merger control exist.

Media sector

The CCA has sole competence to decide on concentrations involving media companies. However, the Electronic Media Act (Official Gazette, No. 136/13) defines in articles 54 and 55 specific threshold requirements for certain types of media undertakings that deviate from the general turnover thresholds. Moreover, according to article 57 of the Electronic Media Act, the Electronic Media Agency is authorised to order the shareholding structure of a media company to be changed (otherwise its media licence could be withdrawn). Furthermore, the Media Act (Official Gazette, No. 81/13) prohibits concentrations that would result in a combined market share of more than 40 per cent in the markets comprising all daily or all weekly newspapers in Croatia, respectively.

Postal and electronic communications sectors

According to article 68 of the Electronic Communications Act (Official Gazette, No. 72/17), operators with significant market power and operators who have been granted licences to use radio frequencies are obligated to notify HAKOM of any intention to merge or consolidate or of

any other type of joint or coordinated action (irrespective of whether the turnover thresholds are met). Prior to the implementation of any such operation, HAKOM must issue an approval. If the intended operation also qualifies as a concentration exceeding the jurisdictional thresholds, a notification also has to be filed with the CCA. In the course of the assessment, the CCA may invite HAKOM to comment on the case.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no explicit filing deadline. However, the notification has to be submitted to the Croatian Competition Agency (CCA) prior to the intended implementation of the concentration and following the conclusion of the merger agreement or following the publication of the invitation to tender, on the basis of which control or decisive influence will be acquired by the controlling undertaking. The parties may submit the notification even before the conclusion of the merger agreement or the publication of the invitation to tender, if they are able to provide, in good faith, evidence of the proposed conclusion of the merger agreement or the announcement of the invitation to tender. In the case of a breach of the filing obligation, the CCA may impose a fine of up to 1 per cent of the undertaking's total annual turnover realised in the preceding business year.

10 Which parties are responsible for filing and are filing fees required?

There are two scenarios to consider.

In case of an acquisition of an entire undertaking or parts of one or more undertakings by another undertaking, the notification has to be submitted by the undertaking acquiring control.

In all other cases, the parties to the concentration have to submit a joint notification in relation to the concentration.

An initial filing fee of 7,000 kunas is payable prior to the submission of the notification, and proof of payment must be submitted to the CCA together with the notification. For notifications in the media sector where the general turnover thresholds are not met, the initial filing fee amounts to 3,500 kunas.

A fee of 105,000 kunas is payable if the CCA adopts its decision after an in-depth investigation.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The intended concentration must not be implemented prior to clearance (suspension obligation).

As to the waiting periods, there are two periods to consider.

First, following the submission of the notification, the CCA first assesses the completeness of the merger notification. The law does not provide for a specific time frame; in practice, it is thus recommended to be in contact with the authority during this stage to ensure that this period is short.

Second, once the CCA has issued the confirmation of completeness, it then assesses the intended concentration in one or two phases, depending on whether the intended concentration raises competition concerns or not.

In Phase I, the CCA has 30 days to clear the intended concentration. If no decision has been adopted prior to the expiry of this waiting period, the intended concentration is presumed by law to be approved in Phase I.

If, however, the authority takes the view that the intended concentration gives rise to competition law concerns, it shall adopt a procedural order on the initiation of Phase II proceedings. Once the CCA has initiated Phase II proceedings, it must issue a decision within three months (which may be extended by an additional three months, if this is necessary to carry out additional market analysis). If no decision has been adopted prior to the expiry of the waiting period, the intended concentration is presumed by law to have obtained clearance in Phase II.

According to article 19(6) of the Competition Act, the CCA may, in particularly justified cases, upon the request of the parties, permit the implementation of particular actions relating to the implementation of the notified concentration before the expiry of the applicable waiting period. When deciding on such a request, the CCA takes into account all circumstances of the case, in particular the nature and gravity of the damages that might be posed to the parties to the concentration or third parties, and the effects of the concentration on competition. From publicly available information one can derive that such pre-clearance implementation is rarely granted.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

There are two principal categories of sanctions for closing or integrating the activities of the merging businesses prior to clearance. The distinction between the two is made based on whether the notifiable concentration would have to be prohibited or not.

In case the concentration has been closed prior to clearance, and the requirements for obtaining a clearance have not been met (irrespective of whether a notification has been submitted to the CCA), the CCA may impose a fine of up to 10 per cent of the undertaking's total annual worldwide turnover generated in the preceding business year. The fine is imposed where the infringement has been committed intentionally or negligently. Notions of intent and negligence should be interpreted in line with the case law of the Court of Justice of the European Union, and not in line the meaning assigned to them in criminal matters.

Where the concentration could in principle obtain clearance, but has been closed prior to clearance (irrespective of whether a notification has been submitted or not), the CCA may impose a fine of up to 1 per cent of the undertaking's total annual turnover generated in the preceding business year. A similar fine will be adopted if the merger filing provides incorrect or false information about the parties and their businesses.

In addition, the CCA may order any indispensable measures aimed at restoring effective competition in the relevant market, and set appropriate deadlines for their adoption. In particular, the CCA may:

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

There are no publicly available cases in which the CCA has recently imposed such sanctions to restore competition.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The sanctions for closing before clearance (gun jumping) are also applicable in foreign-to-foreign mergers. However, we are not aware of these sanctions having been applied in practice to such mergers since the introduction of the Competition Act, as they usually fall outside the

scope of the Croatian merger control regime (inter alia, a merger filing is only required if at least one of the undertakings concerned has its seat or a subsidiary in Croatia).

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The Competition Act does not explicitly provide for hold-separate (carve-out) solutions. Foreign-to-foreign concentrations are therefore assessed and treated in the same way as local concentrations. The Competition Act includes an additional local jurisdictional threshold requirement, according to which at least one of the undertakings concerned is required to have its seat or a subsidiary in Croatia. If this (additional) requirement is not met, a concentration does not require a notification in Croatia. As a result, since the introduction of the Competition Act, most foreign-to-foreign mergers that could require hold-separate (carve-out) solutions fall outside the scope of the application of the Croatian merger control regime. The CCA may in particularly justified cases, upon the request of the parties, permit the implementation of particular actions relating to the implementation of the notified concentration before the expiry of the applicable waiting period.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

The Croatian Takeover Act (Official Gazette, No. 148/13) stipulates that the deadline for requesting an approval from the Croatian Financial Services Agency to publish the public offer for shares in stock companies is suspended until merger clearance is granted by the CCA. Therefore, potential acquirers are not required to submit their public offers before the CCA has issued the merger clearance.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The information and documentation to be submitted in a merger notification is set out in article 20 of the Competition Act and in the Regulation on the Notification and Assessment of Concentrations (the Regulation).

Inter alia, the following needs to be provided:

- information on the parties to the concentration (eg, names, registered seats, excerpts from the commercial register, nature of the business, ownership and control; description of the distribution and retail networks; and annual financial reports for the last preceding business year);
- power of attorney;
- description of the intended concentration;
- certified copies or originals of all documents on the basis of which the concentration takes place;
- definition of the relevant markets;
- market shares held by the undertakings concerned on the relevant markets;
- information on main competitors and their market shares in the relevant markets;
- description of the distribution and retail networks in the relevant markets, relevance of research and development;
- economic rationale of the concentration;
- description of the benefits expected to result from the concentration for consumers; and
- (if available) copies of analyses, reports or studies related to the relevant markets.

The CCA may request additional information from the undertakings concerned, such as information on the number of their employees, their top five suppliers and customers, or sales figures (value and volume). If some of the information requested in the Regulation is not available to the parties, this must be stated in the filing, together with information as to where the undertakings tried to collect the data concerned, the reasons why this collection was not successful, and where the CCA could obtain the missing information.

The notification and all documents attached thereto need to be submitted in the Croatian language. In addition, all documents submitted to the CCA must be in the form of an original or a certified copy bearing an apostille (depending on the jurisdiction of origin of a particular document). If a document requires translation, both the original or a certified copy and its certified Croatian translation have to be provided.

The Competition Act also envisages the possibility to submit a short-form notification in cases that – from experience – usually do not give rise to competition law concerns. The Regulation, that defines the precise content of short-form notifications, has been published in the Official Gazette (No. 38/11) and came into force on 9 April 2011.

According to article 20 of the Competition Act, a short-form notification may be submitted if:

- none of the parties to the concentration are engaged in business activities in the same relevant product and geographic market (ie, no horizontal overlaps), or in a market that is upstream or downstream of a market in which another party to the concentration is engaged (ie, no vertical relationship);
- two or more of the parties to the concentration are engaged in business activities in the same relevant product and geographic market (horizontal relationship), provided that their combined market share is less than 20 per cent, and/or when one or more of the parties to the concentration are engaged in business activities in a relevant product market that is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationship), provided that none of their individual or combined market shares at either level is 30 per cent or more;
- a party to the concentration is to acquire sole control of an undertaking over which it already has joint control; or
- in cases in which two or more undertakings acquire control over a joint venture, where the joint venture has no, or negligible, actual or foreseen activities within Croatia.

However, even in these cases, the CCA may require a full notification to be made if it finds that the concentration may lead to a significant impediment of effective competition.

If the merger filing provides incorrect or false information about the parties and their businesses, the CCA may impose a fine of up to 1 per cent of the undertaking's total annual turnover generated in the preceding business year.

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

Following the submission of the merger notification, the CCA first assesses its completeness. The law does not provide for a specific time frame for the review of the completeness of the notification. Once the CCA has issued the confirmation of completeness, the CCA assesses the intended concentration in one or two phases, depending on whether the intended concentration raises competition concerns or not.

18 What is the statutory timetable for clearance? Can it be speeded up?

In Phase I, the CCA has 30 days to clear the intended concentration. If no decision has been adopted prior to the expiry of this time period, the intended concentration is presumed to be approved in Phase I.

If the CCA initiates Phase II proceedings, it must issue a decision within three months. This waiting period may be further extended by an additional three months, if this would be necessary to carry out additional market analysis. If no decision has been adopted by the CCA prior to the expiry of the waiting period, the intended concentration is presumed by law to have obtained the clearance in Phase II.

From publicly available information it can be seen that the CCA usually tends to clear concentrations in Phase I (ie, within 30 days as of the day when the complete filing was submitted).

The Competition Act does not provide the possibility for the parties to obtain a waiver or to apply for expedited proceedings.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

The Competition Act introduced to the Croatian merger control regime the substantive test for the assessment of concentrations that is applied by the EU Merger Regulation (EUMR) (Council Regulation (EC) No. 139/2004). According to article 16 of the Competition Act, the Croatian Competition Agency (CCA) assesses whether the intended concentration would significantly impede effective competition in the market, in particular as a result of the creation or strengthening of a dominant position.

In assessing concentrations, the CCA regularly takes into account special circumstances revolving around the specific case. For instance, in a vertical merger between a meat products manufacturer and a grocery retail chain, as well as in another horizontal merger between two telecommunications operators, the CCA took into consideration the 'failing firm' defence raised by the parties to these concentrations.

20 Is there a special substantive test for joint ventures?

Similar to the rules under the EUMR, if the effect or object of a full-function joint venture is the coordination of the competitive behaviour of undertakings that remain independent, such coordination will be appraised in the review process under rules on prohibited agreements.

Theories of harm

21 What are the 'theories of harm' that the authorities will investigate?

In essence, the CCA investigates the intended concentration on the basis of the following:

- the structure of the relevant market;
- actual and potential competitors in the relevant market;
- supply and potential market supply;
- costs, risks, technical, economic and legal conditions necessary to enter into or withdraw from the relevant market;
- possible effects of the intended concentration on competition in the relevant market;
- market shares and market position, economic and financial power, business activities of the undertakings concerned in the relevant market;
- internal and external advantages for the parties to the concentration in relation to their competitors;
- possible changes in the business operations of the parties to the concentration following the implementation of the concentration; and
- effects of the concentration on other undertakings, especially relating to consumers' benefit, as well as other objectives and effects of the intended concentration, in particular:
  - decrease in prices of goods or services;
  - decrease in transportation, distribution or other costs;
  - specialisation in production; and
  - other benefits directly deriving from the implementation of the intended concentration.

Non-competition issues

22 To what extent are non-competition issues relevant in the review process?

The Competition Act does not expressly mention non-competition issues such as industrial policy or public interest issues as being relevant for the assessment process. In practice, however, it is not unlikely that the CCA would take into account non-competition issues in a way similar to the European Commission.

Economic efficiencies

23 To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiencies are part of the appraisal of the concentration and are taken into account under the condition that they are advantageous to consumers.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Based on the assessment of the concentration under the substantive test the Croatian Competition Agency (CCA) may, following the initiation of Phase II proceedings, issue:

- a clearance decision, by which the concentration is assessed as compatible with competition rules;
- a decision declaring the concentration conditionally compatible with the Croatian competition rules, provided that within given time limits certain measures are taken and conditions are met (provisional measures); or
- a decision prohibiting the implementation of concentration.

The CCA may also on its own initiative or upon request of a party to the concentration withdraw or amend a decision when the decision is based on incorrect or false information that has been essential for the decision-making, any of the parties to the concentration have not fulfilled the conditions and obligations determined in the decision of the CCA, or the parties to the concentration cannot duly fulfil the proposed conditions or observe the set deadlines because of unpredictable circumstances beyond their control.

Remedies and conditions

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

In practice, the CCA accepts both structural and behavioural remedies.

An example is the acquisition of a Slovenian food retail business by a Croatian major food production and retail conglomerate. In its decision, the CCA rendered a complex economic and behavioural analysis of the

merger, and ordered a number of measures to counterbalance the anti-competitive effects of this concentration. In particular, these measures included the divestment of 96 retail outlets in the combined network of both undertakings (by either terminating lease agreements, or renting or selling the shops to third parties), and the obligation imposed on the acquirer to ensure that the three bestselling products of five of the target's largest suppliers are offered in its retail network for at least three years. The CCA appointed a monitoring trustee, to ensure that the measures are duly implemented.

In 2009, in the course of the acquisition of a local Croatian oil company by a Hungarian oil company, the CCA demanded that the Croatian target company sell one of its local subsidiaries. The CCA listed in the clearance decision certain requirements to be observed to ensure the future business integrity of the disposed subsidiary after being sold to third parties. In the same year, in a case regarding the acquisition of a local retail chain, the CCA ordered the disposal of certain retail stores. In both cases, the acquirer was ordered to nominate a monitoring trustee, to monitor compliance with the remedies.

In 2014, the CCA imposed a set of remedies on the parties to a concentration in the telecommunications sector. In this case, the CCA accepted the measures proposed by the parties to the concentration, aimed at eliminating negative effects of the concentration on competition. Among other remedies, the concentration was limited to a period of four years following the acquisition. This concentration was initially cleared by the CCA accepting a 'failing firm' defence, since the control over the target was acquired in a pre-bankruptcy settlement process. In this case, in 2017, the CCA partially repealed the initial clearance from 2014, imposing a revised set of remedies on the parties to the concentration. The new remedies were requested and accepted, due to the impact of extraordinary circumstances.

Also, in 2017, the CCA conditionally cleared another concentration in the telecommunications sector, imposing a combined set of structural and behaviorual remedies on the parties to the concentration.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

There are two scenarios relating to remedies (including divestments) that may apply.

First, the parties to a concentration may at any time during the proceedings (eg, already in the notification) offer commitments, upon their own initiative, to remove serious doubts as to the compatibility of the concentration with Croatian competition rules.

Secondly, the CCA may, if it reaches the preliminary conclusion that a concentration may be cleared only subject to conditions or obligations, invite the undertakings concerned to suggest certain remedies to obtain merger clearance. Upon such notice, the parties have one month to propose suitable remedies to the CCA.

When assessing remedies, the CCA takes into account whether they are adequate to restore efficient competition. In the event the CCA does not or only partly accepts the proposed remedies, the CCA is authorised to impose other behavioural or structural measures, conditions, obligations and deadlines, to ensure effective competition (article 22 of the Competition Act).

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

We are not aware of any foreign-to-foreign mergers in which the CCA has requested remedies. According to the publicly available information of the CCA, no such mergers were assessed by the CCA in 2020, while in 2019 only two 'foreign-to-foreign' mergers were assessed by the CCA and cleared in Phase I without remedies.

Ancillary restrictions

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The Competition Act does not contain explicit provisions on ancillary restrictions. However, the CCA generally takes the European Commission's decisional practice into account. Therefore, in practice, ancillary restraints directly related to and necessary for the concentration are usually covered by the CCA's clearance decision.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 Are customers and competitors involved in the review process and what rights do complainants have?

The Croatian Competition Agency (CCA) may gather information ex officio and also require from the undertakings concerned, as well as from third parties (eg, customers and competitors), additional information that it considers necessary for the assessment of the concentration.

Also, both the fact that a notification has been submitted and the fact that Phase II proceedings have been initiated are made public on the website of the CCA, inviting third parties to submit their observations and comments on the intended concentration.

Access to the CCA's case file may only be granted to the parties to the proceedings. According to the Croatian general administrative procedure rules, a 'party' may be an entity that has a right to be such to protect its legal interests. In practice, however, only the undertakings concerned are admitted as parties to the merger control proceedings and, accordingly, third parties may not be admitted as parties to the proceedings. The undertakings concerned have the right to access the case files only once they have received a statement of objections in Phase II. Besides the provisions of the Croatian General Administrative Procedure Act (Official Gazette, No. 47/09), the general rules stipulated in the Competition Act on third parties' rights in the proceedings apply. While they cannot be admitted as parties to the merger control proceedings, interested third parties may submit their comments and observations on the intended concentration, following the CCA's publication thereof.

Publicity and confidentiality

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

As to the publicity given to the process, the fact that a notification has been submitted and the fact that Phase II proceedings have been initiated are made public on the CCA's website, inviting third parties to submit observations and comments on the intended concentration. Decisions made by the CCA are published on its website as well. Access to the case file may only be granted to the parties to the process.

The CCA may not disclose business secrets, namely, information that is defined to be a business secret by law or by the undertakings concerned. Business secrets, inter alia, encompass any business information that has actual or potential economic and market value, and the disclosure of which could result in an economic advantage for other undertakings.

In particular, the CCA does not consider the following to be covered by the secrecy obligation:

- information that is publicly available, including information available through specialised information services or information that is common knowledge among specialists in the field;
- historical information, in particular information that is at least five years old;

- statistical information; and
- data and documentation on which the decision of the CCA is based.

Against this background, it is generally advisable to explicitly mark any confidential information as such in the merger notification and any other comments, statements and documents sent to the CCA. Case-related information that is made public by the CCA is generally published in a non-confidential version.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

The CCA has concluded cooperation agreements with several national competition authorities, for example, Albania, Austria, Bosnia and Herzegovina, Bulgaria, Hungary, Kosovo, Northern Macedonia, Montenegro, Romania, Serbia and Turkey. In addition, the CCA is a member of the International Competition Network (ICN). Since 1 July 2013, the CCA has been a member of the European Competition Network (ECN), inter alia, participating in the ECN's Merger Working Group. The CCA also has participant's status in the OECD Competition Committee and it actively participates in its work and attends the meetings of the OECD Competition Committee. Members of the CCA also regularly participate in conferences, summits and other high-level meetings organised by other competition authorities, thereby ensuring that Croatia is involved in the international competition law dialogue. As for recent developments, the CCA carried out an EU twinning light project in Montenegro, aimed at strengthening the administrative capacities of the Montenegrin competition authority through training of its staff, particularly in relation to complex economic analyses, evidence collection procedures and surprise inspections (dawn raids). Furthermore, the transposition of EU Directive 2019/1 (the ECN+ Directive) into Croatian law, performed with the most recent amendments to the Competition Act that entered into force on 24 April 2021, is expected to further facilitate and streamline the cooperation between the CCA and national competition authorities in other EU member states.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

A legal action for judicial review against the decision of the Croatian Competition Agency (CCA) must be filed directly with the Croatian High Administrative Court within 30 days from the date on which the decision of the CCA was served. Decisions of the High Administrative Court may be further appealed, on limited grounds, before the Croatian Constitutional Court, which has recently shown a tendency to intervene in competition matters.

In past years, most of the judicial reviews brought before the then-competent Croatian Administrative Court (which was the competent court to decide in competition law cases until mid-2013) were dismissed, and the recent practice of the Croatian High Administrative Court has shown that the tendency of the judges to mostly reject these remedies has not changed. According to publicly available information, only a handful of judicial reviews have been undertaken in relation to merger control proceedings, while the vast majority of follow-on administrative disputes related to other infringements of competition law.

Time frame

33 | What is the usual time frame for appeal or judicial review?

Previously, the judicial review performed by the Croatian Administrative Court could take up to two years. Depending on the complexity of the case, it could take even longer. Although the Croatian High Administrative Court (which took over the respective competency in 2013) has recently performed several judicial reviews in a much shorter period of time (ie, within a few months of the submission of the request for judicial review), showing an improvement in the overall duration of proceedings, other recent cases have shown that the judicial review process still tends to be rather lengthy.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

Because of the relatively high domestic notification thresholds, the number of merger control cases is rather small in Croatia. According to publicly available data, only seven mergers were cleared by the Croatian Competition Agency (CCA) in 2020, out of which six mergers were cleared in Phase I and one merger was cleared in Phase II. In 2020, three notifications were dismissed, as the statutory requirements for the assessment of concentrations by the CCA were not met. Also, according to public information, the CCA cleared 14 concentrations in 2019 and 11 concentrations in 2018 – all but one were cleared in Phase I. In 2017, the CCA imposed a comprehensive set of measures, conditions and deadlines in one Phase II merger clearance decision and, in addition, partially repealed Phase II clearance in relation to a previous decision from 2014, imposing a revised set of remedies on the parties, both aimed at eliminating negative effects on competition in the telecommunications sector.

While there were, according to public information, no recent cases in which the CCA imposed fines for implementing concentrations prior to or without the CCA's approval, in previous years the CCA imposed a number of rather symbolic administrative fines, ranging from approximately €130 to €4,000, on undertakings operating in the media sector for violations of the merger filing obligation.

'Foreign-to-foreign' mergers usually fall outside of the scope of the Croatian merger control regime (inter alia, a merger filing is required only if at least one of the undertakings concerned has its seat or a subsidiary in Croatia). According to the information published by the CCA, no 'foreign-to-foreign' mergers were assessed in 2020, while two were assessed and cleared in Phase I in 2019.

A significant part of the CCA's work includes analysis of notifications of concentrations with an EU dimension, regularly referred from the European Commission. As stated in the CCA's report for 2019, the CCA received 473 notifications of concentrations involving an EU dimension throughout 2019, in which the CCA assessed whether these concentrations had any impact on the Croatian markets.

Reform proposals

35 | Are there current proposals to change the legislation?

The latest amendment of the Competition Act entered into force on 24 April 2021. These amendments were primarily enacted for purposes of transposing EU Directive 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the member states to be more effective enforcers and to ensure the proper functioning of the internal market (the ECN+ Directive) into national law. However, alongside aligning the Competition Act with the EU acquis communautaire, the amendments also encompassed changes to the merger control regime.

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In 2018, the European Commission referred the assessment of a concentration that had an EU dimension to the Croatian Competition Agency (CCA). The referral was made upon request of the undertakings concerned, under the provision of article 4, paragraph 4 of the EU Merger Regulation. The reason for the referral was that this concentration was deemed to have an impact primarily on the upstream retail market for the supply of gas to large industrial customers in the relevant geographic area of Croatia, as well as on the downstream fertiliser production market, the relevant geographic scope of which was found to comprise the territory of the whole European Economic Area (EEA). The CCA cleared the concentration in Phase I. This merger control case involved intensive cooperation between the CCA and the European Commission.

In 2019, the CCA cleared the creation of a joint venture related to the markets for production and wholesale of sugar, after conducting an in-depth market investigation and an analysis of customer demand patterns. In this case, the CCA concluded that the relevant geographic markets comprised at least the territory of the EEA. In 2019, the CCA cleared a complex concentration, involving a mixed share and asset deal, part of the transaction of a portfolio of distressed assets and non-performing loans (NPLs). This was the first NPL transaction filed under the merger control regime in Croatia.

In January 2020, the CCA cleared a vertical concentration of a media services provider and a provider of telecommunications services in Croatia. In this case, one interested undertaking approached the CCA, asserting that the merger may result in anticompetitive effects on the market competition, supported by an opinion of a legal expert. Although there were no direct vertical overlaps, the CCA assessed the prospective spillover effects and the creation of prospective barriers on connected markets. After a detailed assessment by the CCA, the merger was eventually cleared in Phase II. In 2020, there were also three mergers in the food sector, two in the tourism and hospitality segment, and one in the markets relating to sales and services of motor vehicles, all of which were cleared in Phase I.

In 2021, the Croatian legislator enacted significant amendments to the Competition Act, transposing the relevant EU instruments into local law and introducing changes to the merger control regime.

As for current trends, the outbreak of covid-19 has slowed down economic activities throughout the EU in 2020 and 2021. It still remains to be seen how the pandemic will affect M&A, as well as what its impact on merger control proceedings in Croatia will be. In any event, it is expected that many companies will face economic issues, resulting in restructurings or bankruptcies. In this respect, companies with better market standing and access to funds may have the opportunity to purchase operations of their competitors, and we may see an increasing number of 'failing firm' defences.

WOLF THEISS

Luka Čolić
luka.colic@wolftheiss.com

Borna Dejanović
borna.dejanovic@wolftheiss.com

Eurotower, 19th Floor
Ivana Lučića 2a
10 000 Zagreb
Croatia
Tel: +385 1 4925 400
Fax: +385 1 4925 450
www.wolftheiss.com

Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

Croatia	
Voluntary or mandatory system	Mandatory.
Notification trigger/ filing deadline	The notification has to be submitted to the CCA prior to the implementation of the concentration and following the conclusion of the merger agreement on the basis of which control or decisive influence will be acquired or following the publication of the invitation to tender.
Clearance deadlines (Stage 1/Stage 2)	In Phase I, the CCA has 30 days to clear the concentration. If no decision has been adopted after the expiry of the waiting period, the concentration is deemed to be cleared in Phase I. Should the authority enter into Phase II proceedings, the final decision regarding the concentration must be taken within three months (which may be extended by an additional three months). If no decision is taken prior to the expiry of the waiting period, the concentration is presumed by law to be approved in Phase II.
Substantive test for clearance	The CCA assesses whether the intended concentration would significantly impede effective competition in the market, in particular as a result of the creation or strengthening of a dominant position.
Penalties	In the case of a breach of the merger control rules, the CCA may impose fines ranging between 1 and 10 per cent of an undertaking's total annual turnover realised in the preceding business year, depending on the type of breach.