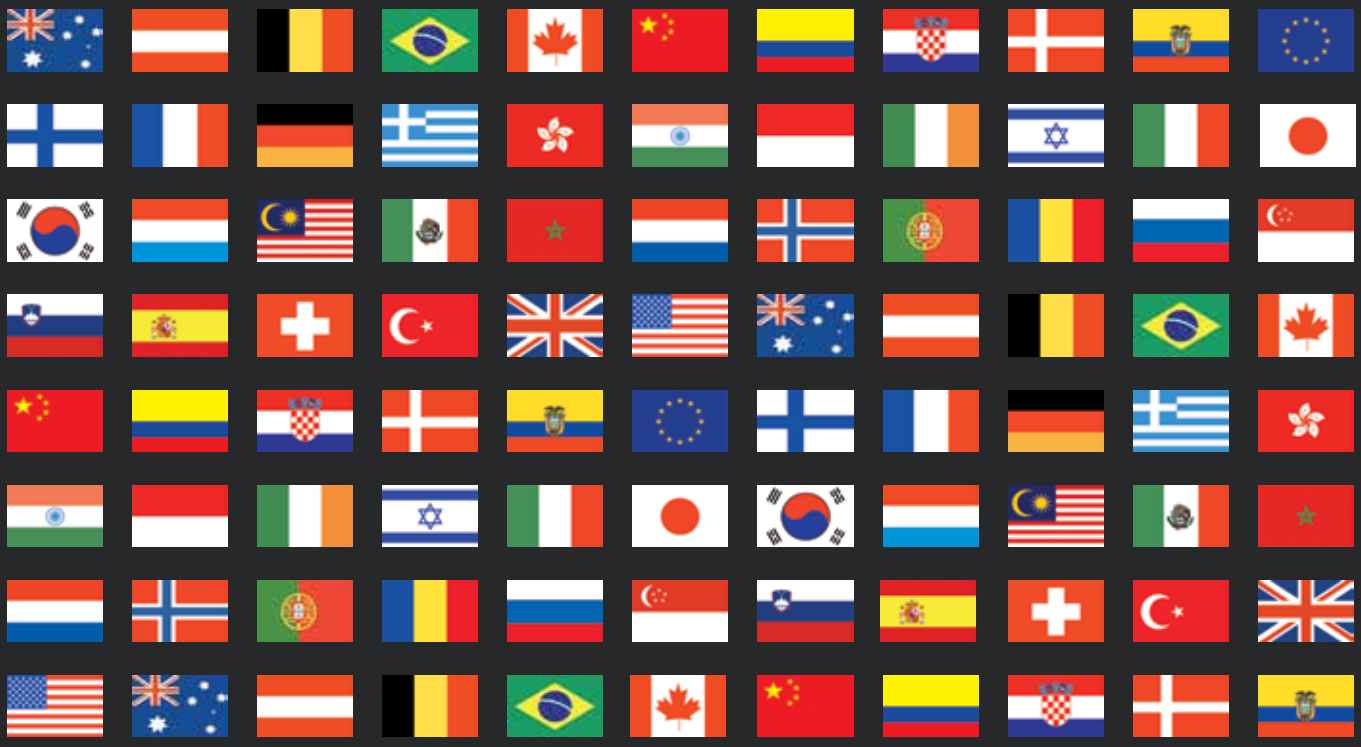
Dominance

Contributing editors
Thomas Janssens and Thomas Wessely



2016

GETTING THE DEAL THROUGH

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Dominance 2016

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Freshfields Bruckhaus Deringer

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Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2003
Twelfth edition
ISSN 1746-5508

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Croatia

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Posavec, Rašica & Liszt

General

1 Legislation

What is the legislation applying specifically to the behaviour of dominant firms?

The legislation applying to the behaviour of dominant firms is, predominantly, the 2009 Competition Act (amended in 2013). This Act defines dominance, which can be held individually or jointly, prohibits abuse of the dominant position and empowers the Croatian Competition Agency (Agency) to adopt the corresponding decisions declaring the infringement, prohibiting such conduct, establishing measures and conditions in order to remedy the adverse effect of such behaviour and to restore competition, as well as to impose fines. The Competition Act also states that a concentration of undertakings that would significantly impede effective competition in the market (SIEC test), in particular where such a concentration creates or strengthens a dominant position of the undertakings parties to the concentration, shall be deemed incompatible with competition rules and, therefore, prohibited.

At the same time, under the EC Regulation No. 1/2003 and article 2a of the Competition Act, article 102 of the Treaty on the Functioning of the European Union (TFEU) is directly applicable in Croatia. The applicable subordinate legislation is the 2011 Regulation on the Definition of the Relevant Market.

2 Non-dominant to dominant firm

Does the law cover conduct through which a non-dominant company becomes dominant?

The Competition Act covers the conduct through which a non-dominant company becomes (or attempts to become) dominant only by the provision prohibiting a concentration, should such a concentration create a dominant position of the undertakings parties to the concentration (see question 1).

3 Object of legislation

Is the object of the legislation and the underlying standard a strictly economic one or does it protect other interests?

In general, the object of the legislation and the underlying standard is an economic one. According to the Annual Plans of the Agency in the past couple of years, its mission is to create a market that works well for consumers. Effective competition drives the long-term productivity growth based on efficient allocation and use of limited resources, environmental protection, innovation and investment, which promotes this objective.

4 Non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms? Is your national law relating to the unilateral conduct of firms stricter than article 102?

There is no special provision with regard to non-dominant firms within the Competition Act. However, the Trade Act provides for certain prohibitions of types of unilateral business conduct that are similar to certain forms of abuse and present unfair trading practices and also, the Obligations Act serves as lex generalis in contractual relations and sets general obligations on bona fidem behaviour of the contractual parties, especially between businesses.

Comparing the provision of the national law with article 102 TFEU we cannot detect any discrepancies. Article 13 of the Competition Act provides basically the same as article 102 and, in that sense, the practice of the Agency has, until now, been thoroughly influenced by the administrative practice of the European Commission.

5 Sector-specific control

Is dominance regulated according to sector?

There are no sector-specific regulations on dominance except for in the electronic communications sector. The 2008 Electronic Communications Act, as amended, defines the operator with significant market power as an operator who either individually or as an operator controlled by another operator, or jointly with other operators, enjoys a position equivalent to dominance, which means a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, users and consumers. The sector regulatory agency, the Croatian Regulatory Authority for Network Industries (HAKOM) has the right to maintain or amend certain regulatory obligations referred to in the law should it establish that competition on the relevant market is insufficiently effective. However, pursuant to Electronic Communications Act, the application of its provisions must not influence the scope and competence of the competition authority.

It has been well established case law of the Agency to emphasise its sole competence in dealing with infringements of the Competition Act. At the same time, sector specific control is present for media regulation, railway market regulation, electric energy market and the gas market, although they do not specifically regulate dominance.

6 Status of sector-specific provisions

What is the relationship between the sector-specific provisions and the general abuse of dominance legislation?

Competition provisions and sector-specific provisions constitute a unique set of measures to provide a liberalised and competitive environment. Nevertheless, it should be stressed that the Agency is solely responsible for the application of the Competition Act regarding all forms of prevention, restriction or distortion of competition by undertakings in the territory of Croatia or outside the Croatian territory, if they have impact in Croatia or affect the trade between Croatia and EU member states. The nature of the two systems has been illustrated in the text of the Agency's decision in the case against Croatian Telecom, where it has been pointed out that the Agency is entrusted with ex post actions in all markets, which includes the telecommunications market as in this particular case, without prejudice to the competent authority of HAKOM to deal on daily basis with issues related to the telecommunications market, and without prejudice to its powers creating a long-term, highly specific, precise, wider, strict legal framework for all segments of the market, as well as its supervision.

7 Enforcement record

How frequently is the legislation used in practice?

In recent years the Agency has intensified its activities in the field of dominance. Throughout the whole of 2014, the Agency solved 56 such cases, out

of which 42 were brought before it in that same year. From mid-October 2014 to mid-October 2015, the Agency rendered 22 decisions in dominance cases, out of which 14 concerned the rejection of initiatives after the examination and analysis of the market in the preliminary procedure (unofficial data). In the remaining eight decisions the Agency exercised a variety of its powers.

In the *Peugeot* case in which the preliminary measures were first adopted, the Agency ultimately adjourned the procedure because the legal assumptions to prosecute had not been fulfilled. In some cases, the undertakings whose abuse was assessed came forward to the Agency offering commitments to meet certain conditions and obligations within a set time period in order to eliminate the negative effects on competition. Such commitments were accepted by the Agency in the *Gemicro* and *Vodoopskrba i odvodnja* cases. This confirms that the activities of the Agency throughout 2015 continued to be primarily aimed at restoring competition on the basis of commitments offered by undertakings at an early stage of the proceeding, in accordance with the European Union and comparative practice. No decision establishing dominance was rendered that follows the laid-out commitments policy. However, in paying attention to the whole practice of the Agency, one can conclude that in future cases of suspected dominance in which the offered commitments would not suffice, the Agency would indeed exercise its full powers.

During the period in question, the High Administrative Court was also active when reviewing the challenged decisions of the Agency. It upheld a number of such decisions, most significantly in the *Adris Grupa and TDR* case in which the dominance was established (decision of the Agency, 2011). What is not so common is the fact that the Court annulled the first decision of the Agency of May 2014 on adjourning the procedure in the *Croatian Telecom* case. However, in the new, repeated procedure the Agency again adjourned the procedure, which decision was again challenged by the initiator, a competitor of Croatian Telecom. That case is now pending before the Court.

8 Economics

What is the role of economics in the application of the dominance provisions?

In each individual case it investigates, the Agency primarily needs to establish whether that particular undertaking has a dominant position in the relevant market. This means that the Agency needs to take into account the market share of that undertaking in a specific market, its market strength, as well as other circumstances in the relevant market. When assessing abuse of dominance, the Agency must consider the competitive structure of the whole market; from the effective pressure of the competitors on the suppliers to the reactions of the competitors, buyers and consumers, the existence of barriers for the strengthening of existing competitors or entry of new ones to the market, purchasing power of the undertakings, negotiating powers of the suppliers, etc. All this needs to be done through a thorough legal and economic analysis. Also the impact of the actions of an undertaking in a dominant position must be evaluated through economic criteria. Before opening a formal proceeding on the abuse of dominance, the Agency runs a complex inquiry of the conditions on the relevant market. For the performance of the mentioned tasks the Agency has its own economic analysis department and generally relies on its findings. Moreover, through the recent changes of its statute, the Office of the Chief Economist has been established showing, thereby, that great importance has been attached to this role. The Office of Chief Economist produces economic analysis in the most complex proceedings within the scope of the Agency's competence, performs expert supervision of the economic analysis produced by other organisational units, produces economic analysis regarding the inquiries of certain markets independently of the proceedings run by the Agency and creates a database of the markets of goods and services.

The case law of the Agency shows that the parties to the proceedings are free to submit any kind of additional economic evidence supporting their claims and substantiating their allegations in their written submissions or responses to the questions asked by the Agency. However, the Agency itself has not until now used any kind of external expertise in the course of the proceedings, as such specific expert opinions prove to be very costly and have not been anticipated by the Agency's budget.

9 Scope of application of dominance provisions

To whom do the dominance provisions apply? To what extent do they apply to public entities?

In general, dominance provisions apply to all undertakings (both private and public) as long as they are active in the market. Article 3(3) of the Competition Act provides for an exception stating that it shall also apply to undertakings that are pursuant to separate laws entrusted with the operation of services of general economic interest, those having the character of a revenue-producing monopoly or that are, by special or exclusive rights granted to them, allowed to undertake certain economic activities, providing the application of the Act does not obstruct, in law or in fact, the performance of the particular tasks assigned to them by separate rules or measures and for the performance of which they have been established. This has been illustrated in case law (*Agency v Public Institution National Park Kornati-Murter*) in which the Agency concluded that the legal conditions for opening of formal procedure did not exist because application of the Competition Act would prevent, legally and factually, the performance of tasks of a public institution for which it has been established and assigned to it by separate rules.

10 Definition of dominance

How is dominance defined?

An undertaking can be presumed to be in a dominant position when, due to its market power, it can act in the relevant market to a considerable extent independently of its actual or potential competitors, consumers, buyers or suppliers and, in particular, when an undertaking has no significant competitors in the relevant market or holds significant market power in relation to its actual or potential competitors. The provision lists the criteria that have to be considered when examining the market power of an undertaking. These include market share, financial power, access to sources of supply or to the market itself, connected undertakings, legal or factual barriers for other undertakings to enter the market, the capability to dictate market conditions considering its supply or demand and the capacity of foreclosure against competitors by redirecting them to other undertakings. An undertaking that holds more than 40 per cent of the market share in the relevant market may hold a dominant position, but the position of dominance must be determined by the Agency in each individual case through a complex and comprehensive analysis of all the relevant facts and circumstances in the relevant market.

11 Market definition

What is the test for market definition?

Pursuant to the 2011 Regulation on the Definition of Relevant Market, the 'relevant market' is defined as a market of certain goods or services that are the subject of business operations performed by an undertaking in a specific geographical territory. A relevant product market comprises all products that are regarded as interchangeable or substitutable, considering the products' characteristics, prices, intended use and customers' patterns. The relevant geographical market comprises the area in which the undertakings compete in the sales or supply of products. The basic criteria for relevant market definition is the demand substitutability for the particular product, as well as the supply substitutability of the particular product and, when necessary, potential competitors or barriers to entry. The same criteria and definition of 'relevant market' is also applied to the merger control.

12 Market-share threshold

Is there a market-share threshold above which a company will be presumed to be dominant?

The Competition Act states that an undertaking that holds more than 40 per cent of the market share in the relevant market may hold a dominant position. This is merely an indication of a dominant position in the relevant market. Despite this indication the Agency has to investigate all factual circumstances, analysing the structure of relevant market, legal or factual barriers for other undertakings and other facts relevant for the final assessment. It is also possible that an undertaking holding less than 40 per cent holds a dominant position and, vice versa, that an undertaking holding more than 40 per cent does not hold a dominant position.

13 Collective dominance

Is collective dominance covered by the legislation? If so, how is it defined?

Dominant undertakings may act alone but also in a group. Croatian law provides that if two or more legally independent economic entities act to a considerable extent independently of their competitors, customers or consumers in the relevant market, they may hold a joint dominant position. In 2007, the Agency established an abuse of a joint dominant position in the *Tisak and Distri-Press* case, confirmed by the ruling of the Administrative Court in 2010. In 2015 a number of rejected initiatives claimed an abuse of collective dominance, for example, in the *Dekod and Croatian Football Federation* case. The Agency found grounds to reject such initiatives after conducting preliminary procedures, therefore, such joint dominance was only alleged.

14 Dominant purchasers

Does the legislation also apply to dominant purchasers? If so, are there any differences compared with the application of the law to dominant suppliers?

The provisions regarding dominance apply equally to dominant suppliers and to dominant purchasers, leaving no differences in the application of this provision with regard to the supply or demand side of the undertaking involved.

Abuse in general

15 Definition

How is abuse defined? Does your law follow an effects-based or a form-based approach to identifying anti-competitive conduct?

By virtue of Croatian law, any abuse by one or more undertakings of a dominant position in the relevant market is prohibited, particularly involving behaviour that consists of directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions, limiting production, markets or technical development to the prejudice of consumers, applying dissimilar conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage and making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts, all in line with the corresponding provision of article 102 TFEU.

Although this non-exhaustive list of anti-competitive conduct refers to a form-based approach, the Agency cannot issue a decision establishing an abuse of a dominant position unless it also determines the distortion of competition caused by such conduct over a certain period of time.

16 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The concept of abuse in Croatian law covers both exploitative and exclusionary practices.

17 Link between dominance and abuse

What link must be shown between dominance and abuse?

Dominance itself is not prohibited. Only the abuse of a dominant position is not allowed. To establish the abuse, the Agency first needs to establish the dominance. The abusive conduct may occur on the dominated or the adjacent markets. The Agency has, in various cases, assessed the effects of the conduct of a dominant undertaking in the downstream markets, for example, when a dominant undertaking in the wholesale market was accused of delaying service, thereby influencing the development of competition in the downstream markets.

18 Defences

What defences may be raised to allegations of abuse of dominance? Is it possible to invoke efficiency gains?

As there cannot be any abuse unless the dominance has been determined, the first defence would be to challenge the existence of dominance. In the case where dominance could not be disputed, the undertaking against which the legal proceedings have been initiated can raise any possible defences, including efficiency gains, to rebut the alleged abuse.

Specific forms of abuse

19 Price and non-price discrimination

Both the Constitutional and the High Administrative Court upheld the 2011 decision of the Agency in the *INA (Industrija nafte)* case, in which the abuse of dominance in the form of price discrimination was established. The undertaking breached article 16 of the 2003 Competition Act by contracting jet fuel prices in a non-transparent manner and by applying different prices for domestic and foreign buyers, thereby placing the latter at a competitive disadvantage.

In the *Tisak and Distri-Press* case, the Constitutional Court upheld the 2007 decision of the Agency, in which it was established that the undertakings in question, as the only Croatian press distributors operating on the national level, applied dissimilar conditions to equivalent transactions with different trading parties, thus discriminating against the publisher Media-Ideja in respect of its competitors in the affected daily newspapers publishers market. It is important to stress that both courts (Constitutional and Administrative) emphasised the negative effects of this abuse of dominance towards the consumers.

20 Exploitative prices or terms of supply

In its decision in December 2008, the Agency found that Zagreb Airport and its catering subsidiary abused their dominance in the markets for the supply and transportation of food to aircraft at Pleso airport in two ways. First, the undertaking breached article 16 of the 2003 Competition Act by ceasing to perform the services of transportation and loading and unloading of catering supplies subject to Croatia Airlines's acceptance of supplementary obligations performed by the Zagreb Airport's catering subsidiary, whose services, by their nature or according to commercial usage, have no connection to the subject of such contracts. Second, the Agency established that the undertaking directly imposed unfair prices by adopting a new price list with a 300 per cent increase on certain services and at the same time imposing different prices for the same services.

21 Rebate schemes

In the 2011 *Adris grupa and TDR* case the Agency established that, whereby the former holds controlling interest in the latter, they abused their dominant position in the cigarette sales market, by, inter alia, contracting for restrictive agreements that contained additional obligations imposed by TDR on its buyers in the form of retroactive loyalty rebates. Buyers were obliged to purchase all or a significant part of its requirements only from the undertaking holding a dominant position, but the purchase was rewarded by discounts applying retroactively to purchases made before the threshold is reached (loyalty inducing schemes). The rebates were granted in proportion with the fidelity to the supplier and had encouraged the buyers to satisfy their demand exclusively or almost exclusively with TDR tobacco products.

This decision of the Agency was upheld by the High Administrative Court in 2015.

22 Predatory pricing

In August 2010, the Agency rejected the complaint made by the undertaking B-net Hrvatska against the undertaking Croatian Telecom concerning the alleged abuse of a dominant position in the leased lines market and in the pay-TV service market (IPTV service). They carried out a preliminary analysis of costs incurred by HT in the provision of its IPTV service to end-users, which did not indicate predation in the provision of the service concerned. The analysis was based on the already established EU practice and has demonstrated that the pricing policy in the provision of MAXtv service showed no indication of predatory pricing.

23 Price squeezes

The decision of the Agency, as stated in question 22, also tackled this form of abuse. The Agency established that B-net Hrvatska predominantly used its own infrastructure for the provision of IPTV service for end-users. Therefore, the cumulative criteria, which would be necessary for Croatian Telecom to apply a margin squeeze to its rivals in the downstream market by its price policy in the upstream market, have not been met because B-net Hrvatska has not been using the leased lines from Croatian Telecom but its own set of lines for transmission of cable television signals.

24 Refusals to deal and access to essential facilities

Kino Zadar Film claimed that Blitz film i video distribucija, as a movie distributor, abused its dominant position by refusing to supply the applicant with a copy of a movie while, at the same time, it supplied it to its own affiliate. In 2011, the Agency rejected the claim as unfounded under article 16 of the 2003 Competition Act. The Agency determined that the most popular movies were made available to Kino Zadar Film on the national release date and the movies that were tagged as less commercially attractive were delivered upon the distributor's choice. Kino Zadar Film claimed that its weaker results were solely caused by the abuse of dominant position by Blitz. The Agency found the claim to be unfounded.

Regardless of its findings, the Agency warned Blitz, as a dominant undertaking on the market for movie distribution in Croatia, of its special obligations to treat all exhibitors equally and to offer them a sufficient number of copies in a timely manner along with the possibility to pay a minimum guarantee if the profitability estimate is negative.

In 2012, the Agency initiated a proceeding against the national television company – Croatian Radio-televison (HRT), based on indications that HRT abused its dominant position on the market of provision of services of broadcasting television programmes with national coverage by refusing to deal with the undertaking, Digi Satellite TV. The case has been resolved through the commitments proposed by HRT.

25 Exclusive dealing, non-compete provisions and single branding

In the *Adris grupa and TDR* case, mentioned in question 21, the Agency found that one of the most common vertical restraints in the form of single branding resulted from an obligation or incentive, which made the buyer purchase practically all his or her requirements in a particular market from only one supplier, TDR. Such single branding produces an anti-competitive effect in the form of foreclosure of the market to competing and potential suppliers and, where the buyer is a retailer selling to final consumers, a loss of in-store inter-brand competition.

26 Tying and leveraging

By its decision, made in July 2007, the Agency recognised tying as an abuse of dominance made by Croatian Telecom and its subsidiary T-Mobile on six relevant markets. Tying was performed by conclusions of framework agreements on performing of telecommunication services with 23 customers, which framework agreements contained schedules and attachments under which all of those customers were obliged to perform additional obligations, which by their nature or according to commercial usage, had no connection with the subject of the framework agreements.

27 Limiting production, markets or technical development

In March 2014, the Agency adopted a decision on interim measure and ordered the undertaking Vodoopskrba i odvodnja to temporarily cease and desist the application of the provisions under its General and Technical Conditions for Water Supply Services. Assessment was made that those Conditions prevent competitors from providing services they had been providing before the challenged provisions entered into force and preventing final consumers from freely choosing the provider in the market. Such a provision may lead to abuse of a dominant position on the relevant public water supply market with effects on the market of the provision of services involving water meter and telemetry devices installation for the measurement of water consumption, which provide data for billing and reporting.

This case was closed in 2015 by the Agency accepting the proposed commitments.

28 Abuse of intellectual property rights

To the best of our knowledge, the Agency has not yet established this kind of abuse. This type may also fall under other types of abuse, such as abuse of government process or refusal to deal. Registration of a trademark exclusively to disable competitors from using such a trademark would presumably constitute an abuse of a dominant position.

29 Abuse of government process

To the best of our knowledge, there is no Croatian case law on regulatory procedures abused by dominant undertakings in order to force a competitor out of the market.

30 'Structural abuses' – mergers and acquisitions as exclusionary practices

The Agency has rendered no decisions considering mergers or acquisitions as exclusionary practices under the Competition Act. However, quite recently, in March 2014, the Agency issued a decision on conditionally approved concentration between the major retail chains Agrokor and Mercator. The conditions include a detailed set of measures and conditions Agrokor has to fulfil to evade the negative effects of the merger, all due to its newly acquired dominant position on the retail market. One can interpret that where such measures would not be adequately fulfilled, the said merger could in substance be qualified as structural abuse, even though, in form, still lying in the realm of concentrations.

31 Other types of abuse

Even though the Competition Act does not explicitly mention other types of abuse, as the list is not exhaustive, the Agency has the liberty of finding and defining such other types.

In the 2015 *Dekod and Croatian Football Federation (HNS)* case in which the initiative was rejected, the initiator claimed that the company Dekod, in cooperation with HNS, created the illusion of a great demand for tickets for the Italy v Croatia match in order to sell the tickets for unjustly high prices.

Enforcement proceedings

32 Prohibition of abusive practices

Is there a directly applicable prohibition of abusive practices or does the law only empower the regulatory authorities to take remedial actions against companies abusing their dominant position?

After initiating the proceedings against an undertaking, the Agency may adopt interim measures in cases of urgency due to the risk of serious and irreparable damage to competition and on the basis of a prima facie finding of infringement of the provisions of the Competition Act. Such a decision on interim measures suspends all actions of the undertaking concerned, insists on meeting of particular conditions or imposes other measures reasonably necessary to eliminate the risk and damage to competition. The duration of the relevant measures, as a rule, may not exceed a period of six months. The undertaking is advised that in the case of its failure to comply with the imposed measures it will be fined for the infringement.

33 Enforcement authorities

Which authorities are responsible for enforcement and what powers of investigation do they have?

The responsible authority is the Competition Agency. As a general rule, a procedure of determining abuse of dominant position is initiated by the Agency ex officio. The Agency is empowered to conduct dawn raids of business premises, other premises, land and means of transport, which includes the right to enter and inspect all such premises, land and means of transport, to examine the books and other records related to the business, to seize the necessary documentation and to retain it as long as it takes to make photocopies, where due to technical reasons it is not possible to make photocopies during the inspection, to seal any premises and books or records for the period and, to the extent necessary for the inspection, to ask any representative or member of staff of the undertaking for explanations on the facts or documents relating to the subject matter and purpose of the inspection and to record the answers, etc.

The authorised persons of the Agency must exercise their powers of surprise inspection upon production to the party to the proceeding or the proprietor of the premises and objects of the identity card and the warrant to carry out surprise inspections issued by the High Administrative Court of the Republic of Croatia. When other authorised persons conduct the

Update and trends

The topic of relative dominance has been much discussed in the past couple of years as there have been many situations where unfair trading practices in business relations have been imposed on a weaker party in business and such abuse cannot be tackled by the antitrust legislation due to lack of absolute dominance on the market. This problem is especially present in the retail market and agricultural products market. Also, the undertakings are still often unaware of the exact scope and powers of the Agency so they misplace their initiative before the Agency, which than result in a rejection decision. The alternative in the form of private enforcement still seems not to be an appealing solution for undertakings. Perhaps a new law dealing with such unfair trading practices and entrusting the Agency with the control of such behaviour on the market would be a promising solution. However, no changes to the legislation or other measures of impact in this area occurred in the past year.

The Agency continues to be an active regulator in the field, with an emphasis on a preventive effect of the conducted procedures and rendered decisions. Namely, it seems that the legal institute of 'commitments' has been recognised as an efficient tool in the hands of the Agency. The Agency makes use of such exercise quite often and is willing to terminate the proceedings in such a manner whenever there is no 'smoking gun' in sight.

inspection they shall produce to the party of the proceedings or the proprietor of the premises the written authorisation to participate in the inspection certified by the Agency.

34 Sanctions and remedies

What sanctions and remedies may they impose?

When the Agency establishes abuse, it immediately orders a cessation of any abusive practices, imposes measures, conditions and deadlines for the removal of adverse effects of such practices and imposes fines for the infringements. The Agency may also impose structural remedies and behavioural remedies. Structural remedies shall only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.

The Agency is authorised to sanction violations of competition law. Fines for severe infringements can be imposed in the amount of up to 10 per cent of the total turnover of the undertaking accrued in the past year for which the financial statements have been completed.

The highest fine for abuse of dominance was set according to the 2003 Competition Act before the Agency was entrusted with the imposition of fines in 2009. The Agency established a violation and prohibited any further restrictive activities, but it was the court that fined the Zagreb Airport 1.39 million kuna (€185,000) and its subsidiary 147,000 kuna (€20,000), while the two directors were fined 120,000 kuna (€16,000) each.

As a new trend, the Agency underlined in its Annual Report for 2014 that in that year the Agency started to fully use the tool of administrative penalties. In 2014, the Agency set out fines amounting to slightly over 5 million kuna, and around one third of that amount was already paid in that year (this, however, includes the fines set out in previous years). Particularly meaningful is that the fines, which were set out had a preventive effect, meaning undertakings that took no part in those procedures, nevertheless, followed the wording of the decisions of the Agency and had, thus, complied with the competition law, thereby proving the gravity and broader impact of those decisions.

35 Impact on contracts

What are the consequences of an infringement for the validity of contracts entered into by dominant companies?

The Competition Act is silent on the consequences of an abuse of a dominant position on the validity of contracts. However, the Obligations Act foresees that if a performance is impossible, inadmissible, not determined or not determinable, the contract is void. A performance is inadmissible if it is contrary to the Constitution, mandatory rules or morals of society. Competition law falls under mandatory rules (ius cogens) with the exception of the legal notion of commitments, which enables the party undertaking to autonomously align with the allegedly breached provisions of competition law.

36 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or authority to order a dominant firm to grant access (to infrastructure or technology), supply goods or services or conclude a contract?

Private law protection from breaches of the Competition Act is granted on the basis of the general tort law right to claim damages and is enforced by commercial courts. General rules of the Obligations Act on torts (non-contractual liability for damages) are applicable for antitrust damage claims.

The relevant commercial court rulings in this field are very scarce, one of the few being the case that concerned a subsidiary of the company that runs the Zagreb Airport, which provided catering services to Croatia Airlines. This company, which the Agency subsequently (while civil actions were still pending) found to have breached competition rules, sued the other contractual party for the fulfilment of contracts (unilateral increase of prices, which were found by the Agency to constitute an abuse of a dominant position). The infringement decision of the Agency has been viewed as prejudicial so the court did not allow the claim.

37 Availability of damages

Do companies harmed by abusive practices have a claim for damages?

Undertakings that have made infringements are liable for the damages caused by such infringements. The competent commercial court dealing with a damages claim must take account of the final decision of the Agency establishing infringement of the Competition Act or article 102 TFEU,

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without prejudice to article 267 TFEU. The commercial court may even interrupt the proceeding until the decision of the Agency, the European Commission or the competition authority in another member state has been final and it shall inform the Agency without delay about the submitted damages claim regarding breach of competition law.

The only relevant case in Croatia concerning damages has been filed on the basis of an antitrust decision, which found that a large pharmaceutical wholesaler abused its dominant position. The victim (the owner of a small private pharmacy) sued both the wholesaler and another pharmacy chain, Ljekarne Prima Pharma from Split, for damages. The case is still not final.

38 Recent enforcement action

What is the most recent high-profile dominance case?

Two cases were underlined as high-profile in last year's edition of this chapter, one against Croatian Telecom (HT) and the other against Vodoopskrba i odvodnja (VIO). The case against HT concerns a possible abuse of dominance on the pay-TV broadcasting retail market, as some of the premium sports programmes such as the UEFA Champions League and the Croatian national football league have been available only through MAXtv service owned by HT. Such a restriction of competition could lessen the choice of services to the detriment of the consumers. To the best of our knowledge this case is still pending before the Agency. The other case concerns the relevant market of public water supply and sewage with effect on the downstream market of telemetry devices installation and readings of water consumption. Here, the dominant public undertaking, VIO, offered commitments that were, in the end, accepted by the Agency.

As to cases brought before the Agency in the past year, two cases would qualify as high-profile, one against Gemicro and the other against Peugeot Hrvatska. The procedure against Gemicro (a company providing software and related services to (mostly) leasing companies) was initiated by a company claiming that Gemicro contractually disabled its clients (leasing companies) to, in the future, a contract for provision of such services with competitors of Gemicro who employ former employees of Gemicro. The procedure against Peugeot Hrvatska (an exclusive importer of Peugeot motor vehicles) was initiated by a company claiming that Peugeot Hrvatska, when applying the selective criteria for the network of undertakings providing services of repair of motor vehicles, applied dissimilar conditions to equivalent transactions, thereby excluding the initiator from the network. In both of those cases the Agency accepted the commitments offered by the undertakings in matter.

Getting the Deal Through

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