

REPUBLIC OF CROATIA
AGENCY FOR PROTECTION OF MARKET COMPETITION
COUNCIL FOR PROTECTION OF MARKET COMPETITION

AUTHOR:

TITLE:

The New Competition Act (2003)

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SUMMARY

The Competition Act in the Republic of Croatia has been in force since 1995. It was reviewed in 1997 and 1998. In 2003 there was another review of the Competition Act that had to be brought into compliance with the EC *acquis communautaire*. The legal ground for the harmonization with the *acquis* was set forth in the Stabilization and Association Agreement between the European Communities and its member states and the Republic of Croatia. The new Competition Act 2003 regulates more precisely the rules of protection of competition, but also conforms to the new solutions that have been recently incorporated in the EC regulations. The new Competition Act entered into force in July 2003 and it has been in application since 1. October 2003.

The new Competition Act (2003)

1. Scope of Application

The Competition Act (hereinafter: CA2) is based on Article 88 of the Constitution of the Republic of Croatia and it was adopted on 15. July 2003. CA2 has revised the former Competition Act (CA1)¹. CA2 in its general provisions stipulates the rules and the system of measures for the protection of competition, regulates the powers, duties and the organisation of the authorities entrusted with the protection of competition, whereas it applies to all forms of prevention, restriction or distortion of competition within the territory of the Republic of Croatia or outside its territory, if such practices take effect in the territory of the Republic of Croatia, unless differently stated by particular regulations for certain markets². Furthermore, it applies to companies, sole traders, craftsmen and other legal and natural persons that participate in economic activities in trade of goods and/or services, but also correspondingly to all legal and natural persons that are engaged in a single or temporary trade of goods and/or services in the market, as well as to legal and natural persons that have their seat and permanent residence abroad, provided that their participation in the trade of goods and/or services affects the home market³. The Act also applies to any undertaking controlling another undertaking⁴.

¹ The Competition Act (Official Gazette No 48/95, 52/97, and 89/98; CA1); the Competition Act (CA2) published in Official Gazette No 122/2003), has been in application since 1. October 2003, (Article 70 of the CA2).

² Articles 1 and 2 of the CA2.

³ Article 3 of the CA2. Furthermore, it applies to legal persons, whose founders, shareholders or holders of share capital are the state or local and regional self-government units, and legal and natural persons entrusted pursuant to special regulations with the operation of services of general economic interest, or which are by exclusive rights allowed to undertake certain business activities, insofar as the application of this Act does not obstruct, in law or in fact, the performance of the particular tasks assigned to them by special regulations and for the performance of which they have been established (Article 4 of the CA2).

⁴ CA2 applies to any undertaking controlling another undertaking as well as to the controlled undertaking, whereby an undertaking shall be deemed to be controlled by another undertaking if that undertaking, directly or indirectly: (1) holds more than half of the share capital or half of the shares, or (2) may exercise more than half of the voting rights, or (3) has the right to appoint more than half of the members of the management board, supervisory committee or similar administrative or managing body, or (4) in any other way exercises a decisive influence on the right to manage business operations of the undertaking (Article 5). The CA2 shall not apply to labour relations between employers and employees, nor to the relations that are covered by collective agreements between employers and labour unions (Article 6).

2. Defining the relevant market

The relevant market is defined as a market of certain goods and/or services, which are the subject of the activities performed by the undertaking in the specific geographic territory, whereby the Government of the Republic of Croatia, upon the proposal of the Competition Council issues regulations which stipulate the criteria in defining the relevant market for the purposes of application of the Act⁵.

3. Agreements

3.1. Prohibited agreements

The CA2 prohibits all agreements between undertakings, contracts, single provisions of agreements, explicit or tacit agreements, concerted practices, decisions on the associations of undertakings the object or effect of which is to prevent, restrict or distort competition in the relevant market⁶.

Certain categories of agreements that contribute to improving the production or distribution of goods and/or services, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit shall be granted individual or group exemption under the conditions laid down by the Government of the Republic of Croatia, upon the proposal of the Competition Council⁷. Moreover, there are particular cases when it is reasonable to grant individual exemption to certain categories of agreements between undertakings⁸.

⁵ The relevant market is defined in Article 7 of the CA2 containing the authority of the Government in defining by means of separate regulations the concept of the relevant market in the Republic of Croatia.

⁶ This is the content of the provisions of Article 9 of the CA2 that defines the agreements that: (1) directly or indirectly fix purchase or selling prices or any other trading conditions;(2)limit or control production, markets, technical development or investment;(3)share markets or sources of supply;(4)apply dissimilar conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage;(5) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to point out here that the agreements that prevent, restrict or distort competition and may not be exempted under the benefit conditions stated in Article 10 of the CA2 shall be null and void.

⁷ The provisions of Articles 10 and 11 of the CA2 stipulate the conditions for group exemption, as regards to the following categories of agreements: (1) agreements between undertakings not operating on the same level of production or distribution, and in particular, agreements on exclusive distribution, selective distribution, exclusive purchase and franchising;(2)agreements between undertakings operating on the same level of the production or distribution, and in particular, research and development and specialization agreements;(3) agreements on transfer of technology, license and know-how agreements;(4)agreements on distribution and servicing of motor vehicles, and (5) insurance agreements. Here it has to be pointed out that the regulating group exemption also contains the provisions on conditions that such agreements must obligatorily contain; restrictions or conditions such agreements must not contain; and other provisions such agreements must comply with.

⁸ Individual exemption of the agreement between undertakings is regulated under Article 12 of the CA2, if the particular agreement fulfils the conditions from Article 10, to be applicable for a limited

The CA2 also contains the provisions relating to the exemption granted to agreements of minor importance⁹. Nevertheless, the Competition Agency may, annul, cancel or amend the decision on exemption, if it has been based on incorrect or untrue information, which exerted decisive influence on the taking of the decision concerned¹⁰.

period, which as a rule may not exceed five years, but may be additionally extended for no longer than five years, if the parties to the agreement can prove that the agreement continues to comply with the conditions set out in Article 10 of the CA2. Nevertheless, the Competition Agency may by means of a decision determine the measures and conditions indispensable for the exemption of the agreement, the deadlines for their fulfilment, and if so, the day of the entry into force of the exemption in question.

⁹ Article 13 of the CA2 provides for the agreements of minor importance, and these are considered agreements in which the parties to the agreement and the controlled undertakings have an insignificant common market share, under the condition they do not contain the provisions that, in spite of the insignificant market share, lead to prevention, restriction or distortion of competition.

¹⁰ Article 14 of the CA2 states that the Competition Agency may annul the decision on exemption when:(1) market position and conditions that have been decisive for taking that particular decision have changed, and the criteria for the exemption are no longer satisfied;(2) the parties to the agreement have failed to fulfil any of the conditions or do not respect any of the measures defined by the decision of the Agency. Furthermore, the Agency may amend its decision on exemption of the agreement when:(1) market position and conditions, over which the parties to the agreement have no control and which do not have for its consequence the annulment of the decision have changed; (2) the parties to the agreement in question are not able to fulfil the conditions or to respect any of the measures attached to the decision of the Agency, owing to the occurrence of circumstances over which they have no control.

4. Dominant position and restrictive practices

4.1. Dominant position

Pursuant to the Act an undertaking is in a dominant position when due to its market power it can act in the relevant market considerably independently of its real or potential competitors, consumers, buyers or suppliers. This is especially the case when an undertaking: (1) has no competitors in the relevant market, and/or (2) holds a position of considerable market power in the relevant market in relation to its real or potential competitors, and especially in relation to the following: market share and position; financial power; access to sources of supply or to the market itself; connected undertakings; legal or factual hindrances for other undertakings to enter the market; the capability of an undertaking to dictate market conditions considering its supply or demand; and the capacity of an undertaking to eliminate other competitors from the market by directing them to other undertakings¹¹.

4.2. Abuse of a dominant position

Any abuse of a dominant position in the relevant market shall be prohibited by law¹². After the Competition Agency has established any of the cases of abuse of a dominant position in the relevant market it shall, as the executive body in the application of the law may issue decision on the following¹³: (1) determine a dominant position and practices of the undertaking abusing this position, i.e. that prevents, restricts or distorts competition, and the duration of the abusive practices concerned; (2) immediately order a cessation of such abusive practices by the undertaking; (3) determine the terms and measures for the removal of

¹¹ Article 15 of the CA2 also provides for establishing the criteria according to which so called "joint dominance" is established, i.e. the situation when two or more undertakings are in a dominant position if they do not compete significantly in the relevant market in relation to specific categories of goods and/or services, and if put together they meet the requirements referred to in paragraph (1) of this Article, and an undertaking shall be presumed to be in a dominant position when it holds more than 40% of the market share in the relevant market. Furthermore, it shall be presumed that more undertakings are in a dominant position when: (1) three or fewer undertakings hold more than 60% of the common market share in the relevant market, or (2) five or fewer undertakings hold more than 80% of the common market share in the relevant market.

¹² Article 16 of the CA2 prohibits any abuse of a dominant position by one or more undertakings in the relevant market, which may, in particular, consist of: (1) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (2) limiting production, markets or technical development to the prejudice of consumers; (3) applying dissimilar conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage; (4) 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.

¹³ Article 17 of the CA2.

adverse effects of such practices; and (4) determine other appropriate measures to ensure competition among undertakings in the relevant market and deadlines for their implementation.

5. Concentrations

5.1. Definition of concentration

Pursuant to the CA2 (1) a concentration of undertakings shall be deemed to arise by means of¹⁴: (1) merger association of undertakings; (2) acquiring control or prevailing influence of one or more undertakings over another undertaking, i.e. of more undertakings or a part of an undertaking, or parts of other undertakings, in particular by: acquisition of the majority of shares or share capital, or obtaining the majority of voting rights, or in any other way in compliance with the provisions of the Company Law and other regulations. A concentration shall also be considered the creation of a joint venture having the nature of a permanent independent economic unit¹⁵.

Acquiring control may be achieved by holding rights, contracts or by other means, through which one or more undertakings, either solely or jointly, within specific legal and factual circumstances, is enabled to exercise prevailing influence on one or more other undertakings¹⁶. Acquisition of shares or share capital, which is the result of the restructuring of an undertaking controlled by other undertakings (merger, association, transfer of property and similar) in the sense of Article 5 of this Act, shall not be deemed to constitute a concentration¹⁷.

¹⁴ Article 19 of the CA2.

¹⁵ Article 19 paragraph (5) of the CA2 lays down that the creation of a joint venture with the objective to coordinate competition among the undertakings that remain independent does not constitute a concentration and shall be assessed as an agreement of undertakings within the meaning of Article 9 of the CA2.

¹⁶ The Government of the Republic of Croatia, on the proposal of the Council, shall pass the regulation on notification and concentration assessment criteria.

¹⁷ Article 20 of the CA2. Nevertheless, a concentration shall not be deemed to arise when 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 to 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, i.e. provided that they exercise such voting rights solely with a view to preparing the disposal of the whole or a part of the undertaking or its shares, provided that they, at the same time: (1) do not undertake any operation which may distort, restrict or prevent competition; (2) carry out the disposal concerned within one year following the acquisition provided for in this Act.

5.2. Prohibited concentrations

There shall be prohibited the concentrations of undertakings that create a new, or strengthen a dominant position of one or more undertakings, individually or as a group, if they can significantly influence the prevention, restriction or distortion of competition, unless the participants in that particular concentration provide valid evidence that their concentration will lead to strengthening of competition in the market, bringing benefits that will prevail over negative effects produced by the creation or strengthening of their dominant position¹⁸.

5.3. Notification of concentration and assessment of notification

Any proposed concentration shall be notified by the undertakings to the Competition Agency¹⁹. The notification of concentration shall be submitted to the Agency for assessment without delay, and at the latest within 8 days following the day of the publication of the public bid or the day of the conclusion of the contract through which the control or prevailing influence of an undertaking is acquired, that period shall begin when the first of these events occurs. The parties to the concentration are obliged to notify the concentration to the Agency if the following conditions are simultaneously met:

1. the total turnover of all the undertakings – parties to the concentration, realized by the sale of goods and/or services in the global market, amounts to at least 1 billion Kuna in the financial year preceding the concentration, and
2. the total turnover of each of at least two parties to the concentration realized by the sale of goods and/or services in the domestic market, amounts to at least 100,000,000.00 Kuna in the financial year preceding the concentration²⁰.

Regarding the calculation of the turnover of undertakings described above, it is regulated by the law, when the concentration consists in association or merger of a part or parts of one or more undertakings, irrespective of whether or not those parts are constituted as legal entities, the calculation of the turnover shall on the seller's side include only the calculation of the turnover deriving from the parts being the subject of the concentration²¹. However, two or more transactions within the meaning of paragraph (6) which take place within a two-year-period shall be considered to constitute one concentration, arising on the day of the last transaction²². The calculation of the total turnover for banks and other financial

¹⁸ Article 18 of the CA2.

¹⁹ Article 19 of the CA2 - parties to the concentration shall notify the concentration to the Competition Agency.

²⁰ The total turnover referred to in Article 22 paragraph (4) of the CA2 shall be calculated taking into account the turnovers of all the parties to concentration and their associated companies acquiring the control or prevailing influence and as a difference of the turnover that they realise by selling goods and/or services among themselves (Article 22 paragraph (5) of the CA2).

²¹ Article 22 paragraph (6) of the CA2.

²² Article 22 paragraph (7) of the CA2.

institutions as well as insurance companies is being separately regulated and shall undergo separate assessment of concentration²³.

The Agency shall initiate the assessment proceedings of a notification of concentration received, immediately upon the receipt of the notification, and shall take into account in the course of the assessment of concentration possible advantages and effects that would occur in the case of implementation of concentration, as well as probable hindrances to enter the market²⁴. Nevertheless, where the Agency considers that the implementation of the concentration concerned could have as its effect considerable prevention, restriction or distortion of competition in the relevant market, it shall order the initiation of the proceedings for the purpose of evaluating the compatibility of the concentration concerned, and within three months following the day of the procedural order on instituting the proceedings, render its decision²⁵.

²³ In the matters of control of concentrations involving banks and other financial institutions as parties to concentrations, the total turnover referred to in Article 22 paragraph (4) of the CA2, shall be calculated on the basis of the total turnover from their regular business operations in the financial year preceding the concentration, in accordance with the Decision of the Croatian National Bank (Article 23 of the CA2). In the matters of control of concentrations including insurance companies as parties to concentrations, the total turnover referred to in Article 22 paragraph (4) of the CA2, shall be calculated on the basis of the total gross premiums of the parties to concentration in the financial year preceding the concentration (Article 24 of the CA2).

²⁴ In the sense of Article 25 of the CA2 there shall be assessed: (1) the structure of the relevant market, actual and possible future competitors in the relevant market, supply and the potential market supply, costs, risks, technical, economic and legal conditions necessary to enter or to withdraw from the relevant market, possible effects of the concentration concerned on competition in the relevant market; (2) market share and position, economic and financial power, business operations of the undertaking concerned in the relevant market, internal and external advantages for the parties to concentration in relation to their competitors, and possible changes in business operations of the parties to concentration, following the completion of the transaction; (3) the effects of the concentration on other undertakings, especially relating to the consumer benefit, as well as other objectives and positive effects of the proposed concentration, such as: (i) decrease in prices of goods and/or services, (ii) shorter distribution courses, (iii) lowering of transportation, distribution and other costs, (iv) specializing in production, and (v) other benefits directly deriving from the implementation of the concentration. In Article 26 the CA2 regulates that (1) If the Agency, on the basis of valid evidence submitted together with the notification of concentration, and on the basis of available information and findings, establishes beyond dispute that it is reasonable to suppose that the implementation of the proposed concentration is not prohibited, and if the notifying party is not given notice, within 30 days following the receipt of the complete notification of concentration, about the procedural order on the initiation of the assessment proceedings of the concentration, the concentration concerned shall be deemed to be compatible. Similarly the Agency shall upon a special request of the undertaking - party to concentration, issue a decision by which the concentration in question shall be declared compatible.

²⁵ Article 26 paragraph (3) of the CA2: The Agency shall namely in the decision by which it evaluates the proposed concentration as conditionally compatible, impose the measures and conditions intended to ensure the compliance, as well as the time limits to be observed, for the purpose of ensuring that the implementation of the proposed concentration shall not cause considerable prevention, restriction or distortion of competition in the relevant market. In this event the parties to the concentration may, as a rule, pursue the activities relating to the implementation of the concentration concerned, as soon as the imposed measures and

(1) by which the concentration concerned is evaluated as compatible, or (2) by which the concentration concerned is evaluated as incompatible, or (3) by which the concentration concerned is evaluated as conditionally compatible, provided that certain measures are observed and conditions met, within the time limits set by the Agency. However, the Agency shall, *ex officio*, or upon request of any of the parties, annul the decision taken, in the following cases: (1) if the decision has been made on the basis of incorrect or untrue information that has been essential for the decision making, and (2) if any of the parties have not fulfilled the conditions and measures determined by the decision of the Agency. In the similar way the Agency may, *ex officio*, or upon request of any of the parties, amend its decision, when the parties cannot fulfil certain conditions imposed on them, or if they infringe certain measures set forth in the decision taken by the Agency, owing to circumstances beyond their control²⁶.

If the prohibited concentration has nevertheless been implemented, the Agency shall impose the *ex post* measures regulated by the law²⁷. Namely the Agency shall, *ex officio*, by means of a separate decision, propose all indispensable measures aimed at restoring efficient competition in the relevant market, and set the deadlines for their adoption in the following cases: (1) when the concentration concerned has been implemented contrary to the decision of the Agency by which the concentration has been evaluated as incompatible, or (2) when the concentration concerned has been implemented without the submittal of a prior notification of concentration and without the decision of the Agency on its compatibility, and has as its effect the prevention, restriction or distortion of competition.

6. Expert opinion of the Competition Agency

Issuing of the expert opinion is one of the aspects of competition law and policy, whereby the Agency issues expert opinions at the request of the ministries and other state authorities, regarding the compliance of draft bill proposals and other legislation, as well as related issues which may significantly influence competition, with the CA2²⁸. The Agency is also competent for issuing expert

conditions referred to in paragraph (4) of this Article have been fulfilled, unless the Agency for a particular legitimate reason decides otherwise.

²⁶ Article 27 of the CA2.

²⁷ Article 28 of the CA2. The Agency may in particular: (1) order for the shares or share capital acquired to be transferred or divested; (2) prohibit or restrict the realization 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.

²⁸ Article 29 of the CA2. The Agency may demand to receive from the ministries or other state authorities, draft bill proposals and other legislation for examination, for the purpose of issuing expert opinions on their compliance with the CA2, where they are deemed to exert significant influence on competition.

opinions on adopting and proposing legislation by the bodies of regional government and local self-government, professional and other associations that pass subordinate legislation, acting according to the conferred public authority²⁹.

7. Organizational structure of the Competition Agency

The Competition Agency performs administrative and professional activities relating to competition³⁰. The managing body of the Agency is the Competition Council³¹. The president and other members of the Council shall be appointed and relieved from duty by the Croatian Parliament, on the proposal of the Government of the Republic of Croatia³². The Agency has its expert team and departments. The president and the members of the Council shall be appointed for a five-year-term of office but they may be relieved from office before the end of the term by the Croatian Parliament³³.

7.1. Decision making and activities of the Council

The Council issues the decisions on all general and individual legislative documents at its sessions, with the consent of a majority of at least three votes,

²⁹Opinions issued pursuant to the provisions laid down in paragraphs (2) and (3) of this Article shall be submitted by the Agency to the Government of the Republic of Croatia (Article 29 paragraph (4) of the CA2).

³⁰ The Agency is a legal person with public authority which is responsible to the Croatian Parliament (Article 30 paragraph (1) of the CA2).

³¹ The Competition Council is the managing body of the Agency; it consists of five members, one of whom is the President of the Council. The President of the Competition Council represents and speaks for the Agency and manages its activities (Article 30 and 31 of the CA2).

³² The president and the members of the Council may be appointed from any citizen of the Republic of Croatia who holds a university degree, ten years of work experience in the professional field concerned, i.e. having specific knowledge in the field of competition law, company law, commercial law, finances and accountancy, microeconomics and other related areas of law and economics, and who may not be state officials, persons who perform duty in any administrative body of a political party, members of supervisory boards and executive bodies of undertakings, or members in any kind of associations of legal or natural persons, which could lead to conflict of interest. It is desirable for the members of the Council to write and publish research or scientific papers and participate in expert or scientific conferences (Article 32 of the CA2). The Council shall prepare the annual report of the activities of the Agency in the preceding year and submit it to the Croatian Parliament (Article 36 of the CA2).

³³ At the proposal of the Government of the Republic of Croatia, the Croatian Parliament may relieve the president or the member of the Council from office before the end of the term:(1)at their own request; (2)if they are convicted of a criminal offence, which makes them unworthy to perform the duty of the president, i.e. the member of the Council; (3)if they permanently lose the ability to perform the duties confirmed to them;(4) if they, during their mandate, assume any of the duties referred to in Article 32 paragraph (4) of the CA2 as incompatible with their position in the Council; and (5) if they, in performing their duty, violate the provisions of the Act (Article 33 of the CA2).

whereby no member of the Council may abstain³⁴. The Council shall perform the following activities³⁵: (1) manage the activities of the Agency; (2) decide upon all issues within the competence of the Agency; (3) propose to the Government of the Republic of Croatia to issue the regulations; (4) draw up subsidiary legislation and administrative decisions to be implemented at the conclusion of the proceedings before the Agency; (5) assess the compliance of draft laws and other relevant legislation with the Competition Act; (6) define methodological principles for studies on competition; (7) determine rules and measures for protection of competition, measures to eliminate prevention, restriction or distortion of competition, and other measures with the aim of improving competition law and policy in the territory of the Republic of Croatia; (8) state opinions and expert advice on decisions and development of comparative practices in the field of competition law and policy; (9) upon request of the Croatian Parliament and the Government of the Republic of Croatia, issue expert opinions relating to competition law and policy; (10) facilitate international cooperation, referring to the realization of the international commitments undertaken by the Republic of Croatia and given to the authority of the Agency, as well as relating to running the projects of international and European economic integrations, i.e. cooperate with international competition authorities and international organisations and institutions; and (11) perform other activities relating to the implementation of this Act. It is important here to point out the trade-related aspects between the Republic of Croatia and the European Communities and their member states³⁶.

7.2. The expert team of the Agency

The expert team of the Agency shall perform administrative and professional activities relating to protection of competition³⁷, in particular: (1) conduct the proceedings on individual issues, and after establishing all relevant facts and circumstances for decision making, report to the Competition Council, which then decides on the particular administrative case; (2) draw up drafts of bylaw legislation necessary for the implementation of the CA2; (3) draw up drafts of administrative decisions implemented in the conclusion of the proceedings before the Agency; (4) draw up drafts giving opinions of draft laws and secondary legislation, as well as giving opinions of other pieces of legislation and measures

³⁴ Three members of the Council shall constitute a quorum and the president of the Council obligatorily attends the sessions, i.e. in the absence of the president the vice-president shall attend (Article 34 of the CA2).

³⁵ Article 35 of the CA2. In performing the activities within its scope, the Council may establish expert advisory bodies that may assist in the decision making process.

³⁶ In the assessment of different forms of prevention, restriction or distortion of competition, that may affect the trading between the Republic of Croatia and the European Communities, the Council shall in accordance with Article 70 of the Stabilization and Association Agreement, stipulated between the European Communities and their Member States and the Republic of Croatia (Official Gazette – International agreements, No 14/01), accordingly apply the criteria arising from the correct application of the rules regulating competition in the European Communities.

³⁷ Article 37 of the CA2.

that may prevent, restrict or distort competition; (5) suggest rules and measures for protection of competition, measures to eliminate prevention, restriction or distortion of competition, and other measures aimed at improving competition law and policy in the territory of the Republic of Croatia; (6) suggest methodological principles for studies on competition to the Council, as well as technical terms in Croatian and business standards; (7) observe and analyse market conditions with the purpose of further development of competition; (8) gather data and information from the undertakings, which are relevant for market studies and stating of market positions, irrespective of the proceedings conducted by the Agency; (9) collect data and information from the undertakings on market positions in single markets, and before issuing decisions on initiating proceedings in each and every particular case, endeavour to restore efficient competition in the relevant market, if this is in the public interest, and unless it involves considerable prevention, restriction or distortion of competition; (10) facilitate international cooperation referring to international commitments undertaken by the Republic of Croatia and given to the authority of the Agency, as well as relating to running the projects of international and European economic integrations, i.e. cooperate with international competition authorities and international organisations and institutions; (11) draft the annual report of the activities of the Agency; (12) prepare the official gazette of the Agency³⁸; and (13) perform other jobs assigned by the Council relating to the implementation of the Act. The Act also regulates the conflict of interest as regards the employees of the Agency³⁹.

7.3. Decision making procedure before the Agency⁴⁰

7.3.1. Parties to the proceedings

A party is a person upon whose request, a specific proceeding has been initiated, against whom proceedings are being conducted, or a person or a group of persons on whose interests the decision taken by the Agency may exert considerable influence, and for whom, upon their own request, the Agency has determined that they have the status of a party in the proceedings⁴¹. The Agency

³⁸ The Agency also publishes the official gazette of the Agency (Article 36 paragraph (2) of the CA2).

³⁹ The persons employed in the expert teams and departments of the Agency may not be members of management or supervisory boards, or boards of undertakings, members of any other associations of legal or natural persons that could cast doubt on their impartiality while conducting proceedings before the Agency, nevertheless, it is allowed to be a member of and to participate in scientific associations, provided that this does not affect impartiality in conducting proceedings before the Agency (Article 38 of the CA2).

⁴⁰ In the proceedings before the Agency, unless otherwise regulated by this Act, the provisions of the General Administrative Procedure Act shall apply (Article 39 of the CA2).

⁴¹ Article 40 of the CA2.

institutes the proceedings *ex officio* or upon the request of the party⁴². Furthermore, the Agency shall institute the proceedings, *ex officio*, if it finds that the practice concerned is likely to cause considerable prevention, restriction or distortion of competition and if: (1) it deems it necessary to protect the identity of the notifying party, and/or (2) having regard to the circumstances of the case, it proves likely that the notifying party has insufficient funds to initiate and conduct the proceedings. It has to be pointed out the institution of the proceedings before the Agency may, in accordance with the provisions of this Act, be requested by: (1) any legal or natural person having a legal or economic interest; (2) any professional or economic interest association of undertakings; (3) a consumer protection association, or (4) the Government of the Republic of Croatia, state administration bodies and regional and local self-government authority units⁴³.

The application for individual exemption of the agreement shall be submitted enclosed with⁴⁴: 1. the original or a certified copy of the agreement, i.e. the certified translation of the agreement if the official text of the agreement is not written in Croatian; 2. Register of Companies certificate, sole trader licence, or other papers proving the claimant's registration; 3. the annual report or financial reports, or other accounting documents for the financial year preceding that of the conclusion of the agreement concerned, for all parties to the agreement; 4. other relevant data the Agency deems necessary for granting individual exemption of the agreement. The following may be also enclosed in the application for individual exemption: 1. evaluation of the relevant market; 2. evaluation of the market share of the participants to the agreement, as well as of the market shares of their competitors in the relevant market⁴⁵.

⁴² The proceedings shall be initiated on the day the Agency issues the procedural order on initiating of the proceedings, as described in Article 41 and Article 46 of the CA2. However, the Agency shall, in exceptions, not institute the proceedings, if it finds that the related activity in the market has minor effect on competition, or if it has insignificant effect on development and maintenance of efficient competition, i.e. that the initiation of such proceedings is not in the public interest.

⁴³ The request for institution of the proceedings before the Agency, involving the parties with contrary interests, (Article 42 of the CA2) shall contain: (i) the name and the seat of the legal person concerned, or the name, surname and address of the natural person – the claimants; (ii) relevant data by means of which it may be established against whom the claim is being made; (iii) facts of the case, practice or circumstances which led to the claimant's request. The claimant may enclose in the claim, in particular: (a) relevant documents and other available evidence which prove the allegations referred to in paragraph (1) item 3 of this Article; (b) evaluation of the relevant market; (c) evaluation of the market share of the claimant as well as of the market shares of the competitors in the relevant market; (d) Register of Companies certificate, single trader licence, or other papers proving the claimant's registration; (e) the annual report or financial reports, or other accounting documents for the financial year preceding the submittal of the claim. The day of the receipt of the request for institution of the proceedings involving the parties with contrary interests shall be considered the day on which the Agency received all the relevant data.

⁴⁴ Article 44 of the CA2.

⁴⁵ Nevertheless, when the claimant requesting the institution of proceedings before the Agency, fails to enclose and submit all data as laid down in Article 42 paragraph (1) of the CA2, the Agency shall request the relevant information from the claimant, and if the claimant fails to act in accordance with the request made by the Agency within eight days, it shall be deemed that the claimant has waived the claim. As the day of the receipt of the application for individual

The notification of the proposed concentration shall be accompanied by⁴⁶: 1. the original or a certified copy of the document, or a certified translation, if the original official text is not written in Croatian, proving the legal grounds for the concentration; 2. annual financial reports for the parties to the concentration for the financial year preceding the concentration; 3. other data as required by the provisions of the Regulation on Concentrations. Moreover, the notifying party shall obligatorily state in the notification if he intends to submit the request for appraisal of concentration to some other body authorised to assess concentrations outside the territory of the Republic of Croatia, or if the notifying party has already submitted the request in question, he shall supply the Agency with the decision of the relevant body, if the decision thereof has already been rendered⁴⁷.

In the proceedings involving parties with contrary interests, the Agency shall deliver one copy of the resolution on the institution of the proceedings and also of the request for the institution of the proceedings, to the party against which the claim has been made, as well as to the persons for which it has been established that they have the status of a party in the proceedings, with the exception of the data considered as official secret⁴⁸. Nevertheless, the Agency shall take all necessary procedural steps, whereas the facts and circumstances relevant for the proceedings shall be stated, ex officio, on the grounds of its own findings, available information and documentation, and thereupon without delay call for the oral hearing⁴⁹. In carrying out enquiries the Agency shall collect the information from the parties to the proceedings⁵⁰. In collecting the information necessary for

exemption of the agreement shall be considered the day on which all data and documents requested were received by the Agency, the Agency issues a special written receipt to the applicant thereof (Article 44 of the CA2).

⁴⁶ Article 45 of the CA2. The date when the Agency has received all the data and documents stated in paragraphs (1) and (2) of the this Article, shall be considered as the date of the receipt of the notification of concentration, and the Agency issues a special receipt to the notifying party thereof.

⁴⁷ The resolution on instituting the proceedings pursuant to Article 46 of the CA2, which is made ex officio, or upon the submitted request, shall contain: 1. reference to the related case; 2. the provisions of this Act pursuant to which the proceedings have been instituted; and 3. the request for submittal of the relevant documentation in the sense of Article 48 of the CA2. The resolution on instituting the proceedings may neither be appealed against nor is it allowed to commence an administrative dispute.

⁴⁸ Article 47 relating to Article 42 paragraph (1), and Article 51 of the CA2. Namely the response shall be produced within a time limit set by the Agency as the case may be. This time limit may neither be shorter than 8 days nor exceed 30 days. Within the determined time limit, the party against which the claim has been made shall be obliged to supply the Agency with its own response and other statements, supplements and documentation relating to the claim. However, the party concerned may, in the case of a justifiable reason, make a request for the time limit fixed to be extended. The Agency may permit the extension of the time limit which may not exceed 30 days.

⁴⁹ Article 47 paragraph (5) as regards Title VIII of the CA2.

⁵⁰ Namely, Article 48 of the CA2 states that the Agency shall by means of a written request: 1. request from the undertakings, in writing or through oral statements, all the required data, and

the proceedings the Agency has legal authority to search the apartment, business premises or seize the relevant objects⁵¹. Nevertheless, the parties to the proceedings have the right of access to case files and are allowed by the Agency to make a photocopy of the file or of single documents⁵².

Here are to be pointed out the strict rules covered by the Competition Act² concerning the secrecy obligation⁵³, and which have been brought into compliance with the positive law of the EU member states. The same strict rules apply to keeping files and documentation received by the Agency in the course of the proceedings⁵⁴.

ask for submittal of the required data and documentation for the inquiry; 2. request from the undertaking concerned to ensure direct inspection of all business premises, all immovable and movable property, business books, data bases and other documentation; 3. request other necessary data and information from other persons, which the Agency deems may contribute to solve and clarify certain issues on prevention, restriction or distortion of competition; 4. request from the undertakings to pursue other activities which it deems necessary for the purpose of stating all the facts relevant to the procedure

⁵¹ The provision of Article 49 of the CA2 stipulates that if there is a reasonable doubt that any of the parties to the proceedings or a third person, holds in possession documents or other instruments relevant to the establishing of the material truth in the proceedings, the Agency shall request the competent misdemeanour court in Zagreb to issue a written warrant ordering the search of particular persons, apartments, or business premises, and the seizure of objects and documents in possession of the undertakings concerned or a third person. The Agency shall request the competent misdemeanour court in Zagreb to issue a written warrant also in cases when a party to the proceedings or a third person fails to act in accordance with the request of the Agency (as referred to in Article 37 item 8 and 9, and Article 48 of the CA2).

⁵² However, the provision of Article 50 paragraph (4), as regards Article 51 of the CA2, stipulates that exempted documents, such as drafts of the decisions of the Agency, official statements and protocols from the sessions of the Council, internal instructions and notes on the case, correspondence and information exchanged with the European Commission or other authorities of the European Communities, as well as other documents considered an official secret, may neither be inspected nor photocopied.

⁵³ The provision of Article 51 of the CA2 stipulates that the president and the members of the Council, as well as 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 the obligation of official secrecy shall also continue to be in effect after the expiry of their engagement with the Agency. Under the term official secret shall be considered, in particular the following: 1. all which is defined to be an official secret by law or other regulations; 2. all which is defined to be an official or a business secret on the basis of bylaw regulations or other regulations of the undertakings, i.e. parties to the proceedings; 3. all that undertakings, or parties to the proceedings have defined as a business or an official secret; as well as 4. all correspondence with the European Commission and other authorities of the European Communities. On the other hand, data and documents which have been made accessible to the general public in any way, or decisions of managing or administrative bodies of the undertakings published to be available to the general public pursuant to particular regulations, shall not be considered an official secret.

⁵⁴ Article 52 of the CA2, according to which files and documentation of the undertakings received by the Agency in the course of the proceedings shall be kept in the archives of the Agency in accordance with the relevant rules on keeping of archive materials.

7.3.2. Other procedural provisions

Procedural provisions relating to carrying out the proceedings before the Competition Agency are based as a rule on the General Administrative Procedure Act (GAPA). Nevertheless, the Competition Act² provides for additional procedural rules which were incorporated as a result of the harmonization of the Croatian legislation with the EU *acquis communautaire*. The necessity of laying down the aforementioned procedural rules refers to the implementation of the provision stating the exemption of the authorised person, who on behalf of the Agency carries out the proceedings regarding the distortion of competition or concentration of undertakings⁵⁵. Nonetheless, as regards the provisions of the CA2 stipulating the oral hearing, it is obligatory to hold the oral hearing, which is as a rule public, in all cases with parties of contrary interests. Even though, the Agency is entitled to conduct the oral hearing in any case when it deems useful⁵⁶.

The Agency may decide upon interim measures where it deems that particular activities of restriction, prevention or distortion of competition represent a risk by creating a direct restraining influence on undertakings, or on particular sectors of the economy or consumers' interests⁵⁷. Furthermore, the time limits for decisions

⁵⁵ Article 53 of the CA2 lays down that the person authorized to carry out the proceedings before the Agency, or to perform certain operations in the proceedings before the Agency, shall be exempted from the case: 1. if he/she is a party in the case in the procedure, witness or expert witness; 2. if he/she is related to the party, to the representative or attorney as family descendant in the straight blood line up to whatever, or up to and including the fourth degree in the transversal line, as an in-law up to and including the second degree, a spouse or extramarital partner, even in the case where the marriage has ceased to exist; 3. if he/she is related to the party, representative or attorney of the party as an adoptive parent, adoptive child, guardian, ward, foster parent or foster child; 4. if he/she is the owner of shares or holds a share capital in the undertaking which is a party in the proceedings before the Agency, or in the competing undertaking; 5. if, in the course of the proceedings, he/she has given testimony or written opinions on certain issues of the case in the capacity of an independent expert; 6. if, for any other justifiable reason, an objective conduct of the procedure and an objective proposal for decision-making regarding the case, cannot be expected. Furthermore, the authorised person shall be obliged to inform, in writing and without delay, the Council of the Agency about the existence of any of the abovementioned reasons. Finally, the request for exemption may be submitted even by a party in the proceedings carried out before the Agency, which is also to be decided by the Council. The request has to be submitted in writing.

⁵⁶ Article 54 of the CA2. Nonetheless, it provides the exemption stating that after it has received the written statement of the party against which it has started the proceedings, decides that the facts of the case between the parties is beyond dispute and that there are no other hindrances preventing the decision to be made, and if it is in the public interest, the Agency may render a decision without calling for the oral hearing. Furthermore, if any of the summoned parties, or their attorneys, fail to appear at the first hearing in the proceedings, the Agency shall, as a rule, postpone the oral hearing and call for a new one, and if any of the summoned parties to the proceedings fail to appear at the following hearing, as a rule, the Agency shall not convene another oral hearing, but shall make its decision on the basis of its own findings, data and information.

⁵⁷ In its decision on interim measures the Agency shall suspend all actions, insist on meeting of particular conditions or impose other measures reasonably necessary to eliminate prevention,

of the Agency are longer taking into consideration the time limits prescribed by general regulations⁵⁸. After the administrative procedure has been completed the Agency shall, in particular, make administrative decisions in which it: 1. assesses the compliance of the agreement with the provisions of the Act; 2. authorizes the exemption of an agreement; 3. determines the existence of abuse of a dominant position; 4. estimates the compatibility of concentrations; 5. imposes interim measures; 6. annuls, cancels or amends the decision of the Agency by means of a separate decision; 7. determines particular measures to be taken in order to restore efficient competition in cases of prohibited concentrations; and 8. makes other decisions, i.e. procedural orders pursuant to the provisions of the Act.⁵⁹ Against the decisions of the Agency no appeal is allowed, but the injured party may file an administrative dispute before the Administrative Court of the Republic of Croatia⁶⁰. Final decisions of the Agency shall be published in the Official Gazette *Narodne novine*.⁶¹

7.4. Penalty clause

Although the Agency may not pronounce penalties, which had been discussed during the preparation of the CA2, finally the pronouncement of penalties was given to the authority of misdemeanour courts, whereby the Agency has kept its specific role in conducting the administrative procedure relating to distortion of competition⁶². There are also high fines foreseen for severe violations of the Act based on the value of the total annual turnover of the undertakings⁶³. Fines for

restriction or distortion of competition, as well as the duration of the relevant measure, which as a rule, may not exceed the period of three months. (Article 55 of the CA2).

⁵⁸ The decision referring to assessment of concentration shall be made by the Agency within the time limit of three months following the day of the resolution on institution of the proceedings. The decision referring to individual exception of the agreement shall be taken by the Agency within four months following the day of the resolution on institution of the proceedings. The decision relating to the abuse of a dominant position shall be made by the Agency within four months following the day when all the facts relevant for the final decision have been determined. The Agency may extend the time limit for the decision making for a subsequent period of three i.e. four months in cases where it is necessary to carry out additional expertise or analyses defining the state of facts and examination of the evidence, or where delicate industries or markets are concerned, about which the Agency has the obligation to inform the parties to the proceedings before the expiry of the prescribed time limits. (Article 56 of the CA2)

⁵⁹ Article 57 of the CA2.

⁶⁰ Article 58 of the CA2.

⁶¹ Rulings and decisions of the Administrative Court in matters concerning claims against the decisions of the Agency shall be also published in the Official Gazette. Decisions and rulings, as well as other legislative documents of the Agency, may be published in the official gazette of the Agency i.e. on its website. However, data considered to be an official secret shall be excluded from the publication.

⁶² Namely, Article 60 of the CA2 stipulates that pursuant to the decision of the Agency, upon violation of the provisions of the CA2, the Agency makes a claim to the misdemeanour court to start the minor offence proceedings against the undertaking concerned and the responsible person of the respective undertaking.

⁶³ The provisions of Article 61 of the CA2 state that the undertaking - legal or natural person, shall be fined at the most 10% of the value of its total annual turnover in the financial year preceding the year when the infringement was committed, if it: 1. concludes a prohibited agreement or

other violations are also very high and they are calculated on the basis of the financial power of the undertaking⁶⁴. The new Act provides also for penalties for a legal person, who is not a party to the proceeding, but is believed to be in possession of information which may clarify the facts relating to the procedure before the Agency, but fails to disclose the information in question to the authorities of the Agency commencing the procedure⁶⁵. The minor offence proceedings instituted upon the violation of the provisions of the CA2 has longer limitations than usually regulated by general procedures, so that they may not be started after three years from the day when the infringement was committed or the penalty pronounced⁶⁶. The Agency shall also cooperate with competent judicial bodies in resolving the cases relating to prevention, restriction or distortion of competition in the market of the Republic of Croatia⁶⁷.

8. References

1. Law on Protection of Market Competition (Official Gazette No 48/95, 52/97, 89/98);
2. Competition Act (Official Gazette No 122/2003);
3. Stabilization and Association Agreement between the European Communities and their Member States and the Republic of Croatia (Official Gazette-International Agreements, 14/2001).

participates in any other way in the agreement that caused prevention, restriction or distortion of competition; 2. abuses a dominant position; 3. participates in prohibited concentration of undertakings, or 4. fails to act in accordance with the decision made by the Agency. For the infringement the responsible person of the undertaking – legal person concerned shall also be fined an amount ranging from 50,000.00 to 200,000.00 Kuna.

⁶⁴ Article 62 of the CA2 stipulates that the undertaking - legal or natural person shall be fined at the most with 1% of the value of its total annual turnover in the financial year preceding the year when the infringement was committed, if it: 1. submits to the Agency incorrect or untrue information which may influence the rendering of the decision on individual exemption of the agreement; 2. fails to notify the Agency on the proposed concentration; 3. submits to the Agency incorrect or untrue information in the concentration assessment proceedings; 4. fails to act according to the request of the Agency; 5. fails to act according to the decision of the Agency; 6. fails to act according to the written order of the misdemeanour court. In the same way, for the infringement the responsible person of the undertaking - legal person concerned shall also be fined an amount ranging from 15,000.00 to 50,000.00 Kuna.

⁶⁵ The provision of Article 63 of the CA2 provides for the undertaking - 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 committed an amount ranging from 5,000.00 to 10,000.00 Kuna.

⁶⁶ Article 64 lays down both relative and absolute limitation periods, so that minor offence procedure may not be instituted after the expiry of the of the double time limit laid down in the CA2, i.e. six years. The imposed penalties may not be enforced if three years have passed from the date when the decision on the violation became legally valid, i.e. the double time if the limitation period for the enforcement of the penalty shall be interrupted by any action of the competent body that is undertaken for the purpose of the enforcement.

⁶⁷ Article 65 of the CA2.