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COMPETITION ISSUES IN TELEVISION AND BROADCASTING

Contribution from Croatia

-- Session II --

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COMPETITION ISSUES IN TELEVISION AND BROADCASTING

-- Croatia[*] --

1. Introduction

1. The television and media sector (furthermore: the Media sector; Sector) is one of the fastest growing economic sectors and its significance encompasses not only the economic and profit generating characteristics of the sectors, but also other important values for the development of human rights and therefore spreading the ideas of transparency, democracy and pluralism.

2. The important role of the Sector should be envisaged also as its role in promoting benefits which can derive from the open media and information society. The interaction of the economic and non-economic values in this sector indicate that there should be created and carefully organized a network of laws and bylaws to regulate the said sector. The purely regulatory aspects implemented by the Law on Media and the Law on Electronic Media, as well as the Electronic Communications Act, should be supplemented by the competition rules in order to safeguard and protect the free competition on the market, because necessity of the enforcement of competition law in respect of the media sector can arise in all areas covered by the protection of the free competition, such as assessment of mergers and acquisitions (M&A), abuse of dominance and agreements, as well as it could be a subject to the competition advocacy activities. In further parts would be elaborated in more detail some specific issues that are covered by the competition legislation in media sector on the national market of the Republic of Croatia.

2. The state of competition in the media and electronic media sector in the national jurisdiction

2.1 The legal framework

3. The legal framework which regulates the media Sector in the Republic of Croatia is mainly built through three capital laws, i.e., the Law on Media (2011), the Law on Electronic Media (2011) and the Electronic Communications Act (2012), beside other bylaws for the implementation of the said laws, such as Bylaws on minimum conditions for performing of the audio and audio-visual media services (2010), Bylaws on content and procedure of the public tender for granting the concessions for performing of the media services of TV and radio (2010), Bylaws on register of the undertakings licensed for performing of media services(2010), and other bylaws.

2.2 The Law on Media (2011)

4. The Law on Media[1] (furthermore: LM) establishes, among others the precognitions for the achievement of the media freedom, the freedom to report and the principles of availability to all of public

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[1] The Law on Media (Narodne Novine – Official Gazette of the Republic Of Croatia, No. 59/2004 and 84/2011).

information, the transparency of the ownership over the media, the rights to publish the corrections and answers, as well as the ways of protection of the free competition[2]. According to the Law, the Media means, inter alia, all written publications and other press, radio and television programs, electronic publications, teletext and other means of daily and periodical information of program contents by the transmission of scripts, voice, sound or picture[3].

2.3 The Law on Electronic Media (2011)

5. The Law on Electronic Media[4] (furthermore: LEM) regulates the rights, obligations and responsibilities of the legal and natural persons who perform the activities of providing of the audio and audio-visual media services and the services of electronic publications by using the electronic communications networks, by which the notion of the electronic media encompass the audiovisual programs, radio programs and electronic publications[5].

2.4 The Electronic Communications Act (2012)

6. The Electronic Communications Act[6] (furthermore: ECA) regulates the field of electronic communications, including the use of electronic communications networks and the provision of electronic communications services, the provision of universal services and the protection of rights of users of services, construction, installation, maintenance and use of electronic communications infrastructure and associated facilities, competition conditions and rights and obligations of participants in the market of electronic communications networks and services, addressing, numbering and management of the radio frequency spectrum, digital broadcasting, data protection and security in electronic communications and the performance of inspection and expert supervision and control in electronic communications, as well as the establishment of a national regulatory authority for electronic communications and postal services and its organisation, scope and competence, including the decision-making procedure and resolution of disputes concerning electronic communications[7].

7. Regarding the relations of the ECA to the competition statutes, it is worth mentioning that the application of provisions of the ECA shall not influence the scope and competence of the competition protection authority established in accordance with a special law, and in the implementation of the ECA the competent authorities shall cooperate with the competition protection authority, namely the Croatian Competition Agency, in such a manner that it requests the opinion of this authority or proposes the institution of proceedings before this authority in all cases of prevention, restriction or distortion of competition, in accordance with a special law regulating competition protection, namely the CL, and where appropriate and possible to provide adequate expert and technical assistance and conclude the appropriate mutual cooperation agreements[8].

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2 LM, Art. 1(1).

3 LM, Art. 2(1).

4 The Law on Electronic Media (Narodne Novine – Official Gazette of the Republic of Croatia, No. 153/2009 and 84/2011).

5 LM, Art. 1. and 2.

6 The Electronic Communications Act (Narodne Novine – Official Gazette of the Republic of Croatia, No. 73/2008, 90/2011 and 133/2012).

7 ECA, Art. 1.

8 ECA, Art. 6.

2.5 The interaction with the Competition Law (2009)

8. The Croatian Competition Law[9] (furthermore: CL), prescribes the competition rules and establishes the competition regime, regulates the powers, duties, internal organisation and proceedings carried out by the competent authority entrusted with the enforcement of the Law, and it applies to all forms of prevention, restriction or distortion of competition by undertakings 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[10].

9. The prescriptions of the Section 4 of the Law on Media, in Articles 35-37, provides for the protection of competition, and prescribes that to the publishers, legal persons who perform the activities in relation to the distribution of media, as well as to other legal persons who perform the activities in connection to the media, shall also be applied the competition statutes. It particularly means that the named persons are obliged to notify the concentration before the Croatian Competition Agency, in a form prescribed by the provisions of the CL, whether or not are fulfilled the conditions prescribed in the Art. 22 (4) of the CL, which establishes the threshold for the obligatory notification of the concentration. Such notification would be appraised from the side of the CCA, based on the general competition rules from the CL. Furthermore, the LM prescribes that it shall be banned the concentration of the undertakings in the market of daily and/ or weekly press aimed for general information, if the market share after its enforcement would excess 40% of the total market share on the product market.

10. The Section V. of the LEM, particularly in Articles 52 through 62, provides the definition of concentration in the media sector, and prescribes some special conditions in relation to the allowed market share for the publishers of media on state and municipal level, which market share shall not be exceeded for the concentration to be allowed, as well as prescribes the conditions in relation to the ownership structure in media in a way that cross ownership and financing shall be banned. The scrutiny of the conditions prescribed in the mentioned section of LEM performs the Council for Electronic Media, and Croatian Competition Agency concurrently, each authority from the aspects of the specific law.

11. Finally, the Competition Agency decides in cases which relate to the assessment of the state aid, according to the provisions of the State Aid Act (2005).[11] One of the most recent decisions of the Agency concerned the authorisation of the state aid to the Croatian audiovisual centre, because it was compatible with the Law.[12]

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9 The Croatian Competition Law (Narodne Novine – Official Gazette of the Republic of Croatia, No. 79/2009).

10 CL, Art. 1 and 2.

11 The State Aid Act (Official Gazette, No 140/2005 and 49/2011). Ref. No. UP/I 430-01/2012-02/004, Stete aid to Croatian audiovisual centre; Decision published in the Official Gazette No. 131/2012 of 20.11.2012.

12 Ref. No. UP/I 430-01/2012-02/004, Stete aid to Croatian audiovisual centre; Decision published in the Official Gazette No. 131/2012 of 20.11.2012.

3. The aspects of the Competition Law enforcement relating to Media Sector

12. Most frequent activities of the CCA concerning the media sector, including the electronic communications and the broadcasting in the past several years related to the assessment of concentrations, namely M&A (Mergers and Acquisitions) and/or the changes in the ownership structure. The notion of concentration is defined based on the CL, in a way that it resembles to the EU acquis communautatire, and the EC Merger Regulation[13].

3.1 The concept of the concentration

13. The concept of the concentration, i.e. M&A, based on the CL is established in a way that a concentration between undertakings shall be deemed to arise where a change of control on a lasting basis results from: merger association of two or more independent undertakings or parts thereof, or by acquiring control or decisive influence of one or more undertakings over one or more other undertakings, or of one or more undertakings or a part of an undertaking, or parts of other undertakings, in particular by: (i) acquisition of the majority of shares or share capital; (ii) obtaining the majority of voting rights; or (iii) in any other way in compliance with the provisions of the Company Law and other rules, whereas the acquisition of control pursuant to the CL may be effected through transfer of rights, contracts or by other means, by which one or more undertakings, either separately or jointly, taking into consideration all legal and factual circumstances, acquire the possibility to exercise decisive influence over one or more other undertakings on a lasting basis. However, the creation of a joint venture by two or more independent undertakings performing on a lasting basis all the functions of an autonomous economic entity shall also constitute a concentration within the meaning of the CL.

14. At the contrary, a concentration shall not be deemed to arise within the meaning of the CL, where: (i) credit institutions or other financial institutions or investment funds or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis (not longer than 12 months) securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking. The 12 month period may be extended by the Agency upon request, where such institutions or companies can show that the disposal was not reasonably possible within the period set; (ii) acquisition of shares or interest which is the result of internal structural changes in either the controlled or controlling undertaking (such as merger, acquisition, transfer of legal title etc.); and (iii) a control is acquired by an office-holder or administration officer – relating to bankruptcy, liquidation or winding up – according to the national Bankruptcy Law and the Companies Act. Furthermore, a creation of a joint venture by two or more independent undertakings performing on a lasting basis all the functions of an autonomous economic entity where such a joint venture has as its object or effect coordination of the competitive behaviour of the undertakings that remain independent which leads to significant impediment to competition shall not constitute a concentration and shall therefore be appraised as an agreement among undertakings within the scope of the CL[14].

15. Furthermore, a concentration of undertakings which would significantly impede effective competition in the market, 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[15].

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13 COUNCIL REGULATION (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)

14 CL, Art. 15.

15 CL, Art. 16.

16. The CL also entails the rules for the obligatory notification of concentration and turnover thresholds[16]. Namely, in order to assess the compatibility of concentration, the parties to the concentration are obliged to notify any proposed concentration to the Competition Agency if the following criteria are cumulatively met:

1. the total turnover (consolidated aggregate annual 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 HRK 1 billion in the financial year preceding the concentration and in compliance with financial statements, where at least one of the parties to the concentration has its seat and/or subsidiary in the Republic of Croatia, and

2. the total turnover of each of at least two parties to the concentration realized in the national market of the Republic of Croatia, amounts to at least HRK 100,000,000 in the financial year preceding the concentration and in compliance with financial statements.

17. But, where the parties to the concentration are unable to deliver financial statements at the time of the notification of concentration, the last year for which the parties to the concentration have concluded their financial statements shall be taken as the relevant year in the assessment procedure. However, the intra-group turnover realized by the sale of goods and/or services by undertakings within a group shall not be taken into account when calculating the total turnover referred to above. Finally, where the concentration involves 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 within the meaning of the CL shall only include the relevant turnover of the parts which are subject to the concentration, whereas, two or more financial transactions which take place within a two-year-period shall be considered to constitute one concentration, arising on the day of the last transaction.

18. The CL prescribes the obligation for prior notification of concentration, so that any concentration between undertakings based on the CL, shall be pre-notified to the Agency by the parties to concentration subject to the criteria set out in the Law, whereas in the case where control or decisive influence is acquired over a whole or parts of one or more undertakings by another undertaking, the prior notification of concentration shall be submitted by the controlling undertaking, and in all other cases, all undertakings parties to the concentration shall agree on the submittal of one joint notification. However, the prior notification of concentration shall be submitted to the Agency for assessment before the implementation of the concentration in question, following the conclusion of the contract on the basis of which control or decisive influence has been acquired by the controlling undertaking, or following the publication of the invitation to tender, but the parties to the concentration may submit the prior notification of concentration to the Agency even before the conclusion of the contract or publication of the invitation to tender, if they, *bona fide*, provide evidence of the proposed conclusion of the contract or announce the invitation to tender.

19. Finally, it is important to mention that the Agency may, in particularly justified cases, upon the request of a party to the concentration, permit the implementation of particular actions relating to the implementation of the notified concentration before the expiry of the time period required by the CL, whereas, in deciding on the request, the Agency would take into account all circumstances of the relevant case, particularly the nature and gravity of the damages which might be caused to the parties to the concentration or to the third parties, and the overall effects on the state of competition of the concentration concerned[17].

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[16] CL, Art. 17.

[17] CL, Art. 19.

3.2 The assessment of compatibility of concentration

20. The Agency shall initiate a compatibility assessment proceeding immediately upon the receipt of the complete notification of the concentration in question, whereas it would take into account its effects on competition and possible limitations on market access, particularly where the proposed concentration creates or strengthens a dominant position of the undertakings concerned[18]. Particularly, in the course of assessment of a concentration the Agency would in particularly define as follows:

1. the structure of the relevant market, actual and potential future competitors in the relevant market within the territory of the Republic of Croatia or outside this territory, supply and demand structure in the relevant market and its trends, costs, risks, economic, legal and other barriers to entry to or withdrawal from the market;

2. the position in the market and the market share, economic and financial power of the undertakings in the relevant market, the level of competitiveness of the undertakings and possible changes in the business operations of the parties to the concentration and alternative sources of supply for the buyers resulting from the implementation of the concentration concerned;

3. the effects of the concentration on other undertakings, and especially relating to the consumer benefit, such as: decrease in prices of goods and/or services, shorter distribution courses, lowering of transportation, distribution and other costs, specializing in production, technological innovation and other benefits directly deriving from the implementation of the concentration.

3.3 Decision on concentration

21. The Agency would issue a decision on clearing the concentration in question, if it, on the basis of valid data and documents submitted along with the notification of a concentration, or on the basis of other available information and findings, establishes beyond dispute that it is reasonable to suppose that the implementation of the proposed concentration is not prohibited within the meaning of the Law, and unless it takes a procedural order on the initiation of the assessment proceedings within 30 days following the receipt of the complete notification of concentration, the concentration concerned shall be deemed to be compatible with the Law[19].

3.4 Suspension of concentration

22. The Agency shall, *ex officio,* by means of a separate decision, propose all necessary measures**,** whether behavioural or structural, aimed at restoring efficient competition in the relevant market, and set the deadlines for their adoption in the following cases:

1. where the concentration concerned has been implemented contrary to the decision of the Agency by which the concentration has been assessed as incompatible and therefore prohibited within the meaning of the CL; or

2. where the concentration concerned has been implemented without the obligatory prior notification of concentration to the Agency, based on the CL.

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[18] CL; Art. 21.

[19] CL; Art. 22.

23. Based on the decision of the Agency, it could be imposed to the parties to the concentration, in particular:

1. an order for the shares or interest acquired to be transferred or divested;

2. the exercise of voting rights related to the shares or interest in the undertakings parties to the concentration, to be prohibited or restricted, as well as an order for the joint venture or any other form of control by which a banned concentration has been put into effect to be removed.

24. The respective decision from the side of the Agency can also contain the imposed fine prescribed by the CL for the committed infringements.

25. The most recent cases of the decisions in relation to the assessment of concentration in media sector concern the concentrations in relating to radio stations.First one concern Irikon, Koprivnica and Radio Drava Koprivnica, where the concentration was cleared in phase 1, and the second one concerned the concentration between the Express radio, Zagreb and Janus, Osijek and Otočni radio Kornati, where the concentration was also cleared in Phase 1[20].

4. Conclusion or the most significant current and future challenges for the competition law and policy in the Media Sector

26. The telecommunications and media sector is highly regulated, and many rules are consisted in sector laws and bylaws, whereas the implementing authorities are the sector ministry and agencies. However, the Competition Agency frequently interacts with the said authorities by issuing the expert opinions and using other tools of the competition advocacy. The legal background for providing the opinions within the scope of competition advocacy is provided in the CL.

4.1 Expert opinions of the Agency

27. The Agency issues expert opinions at the request of the Croatian Parliament, the Government of the Republic of Croatia, central administration authorities, public authorities in compliance with separate rules and local and regional self-government units, regarding the compliance with this Act of draft proposals for laws and other legislation, as well as other related issues raising competition concerns[21].

28. The central administration authorities or other state authorities may be requested to communicate to the Agency draft proposals for laws and other legislation for the purpose of assessment and issuing expert opinions on their compliance with the CL, if it finds that they may raise competition concerns.

29. Furthermore, the Agency shall issue expert opinions assessing the compliance of the existing laws and other legal acts with the CL, opinions promoting competition culture and enhancing advocacy and raising awareness of competition law and policy and give opinions and statements relating to the development of the comparative practice and case law in the area of competition law and policy to the authorities mentioned herewith above.

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[20] Case No. UP/I 034-03/2012-02/003; Irikon d.o.o., Koprivnica / Radio Drava d.o.o., Koprivnica of 24.01.2013.; Clearance of concentration – Phase I.; and Case No. UP/I 030-02/2011-02/002; Expres radio d.o.o., Zagreb / Janus d.o.o., Osijek and Otočni radio Kornati d.o.o., Murter of 27.12. 2012 ; Clearance of concentration – Phase I.;

[21] CL; Art. 25.

4.2 List of the most recent cases

30. The Competition Agency has issued expert opinions in relation to the compatibility with the competition rules which are aimed for the competition advocacy and raising of the competition awareness in many cases, such as:

- Case No. 011-01/2012-02/013, of 08.11..2012., to the Ministry of Culture, Opinion in relating to the draft Law on amendments to the Electronic Media Act;

- Case No. 034-08/2012-01/073 of the 17.09.2012 of 17.09.2012. to the HAKOM – Regulatory Agency for Telecommunications and Postal services; Opinion in relation to the Three criteria test relating to access to the market for operators providing premim rate telephone services;

- Case No. 011-01/2012-02/009 Opinion on Draft proposal of Electronic Media Act with Final proposal;

- Case No. 034-08/2012-01/022 of 31.05.2012; HAKOM – CCA opinion on harmonization the retail price of special rate services ;

- Case No. UP/I 430-01/2012-03/001 of 17.05.2012.; Aid scheme of the Fund for the Promotion and variety of electronic media ; Authorisation of the aid scheme, published in the Official Gazette No. 59/2012;

- Case No. 034-08/2012-01/014 of 12.03.2012; HAKOM – CCA opinion on regulatory framework in the relevant IPTV market.