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Title: Croatia as the 28th EU Member State: Impact on Competition Policy

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Abstract: Croatia joined the EU on July 1, 2013. As with other countries that applied for EU membership and negotiated the accession, competition rules have been of essential importance to the integration process. EU competition rules are part of *acquis communautaire*, which must be adopted and implemented before the accession to the end that a country can show the capacity and willingness to enforce those after it becomes a full EU member. To fulfill the criteria required for the EU accession, Croatia adopted its third Competition Act, which reflected the necessary framework, in 2009. The Act was amended on June 24, 2013 to enable the Croatian Competition Agency to directly apply Articles 101 and 102 TFEU. In addition, the right to damages arising from infringements of competition law has been introduced by the last amendments. This paper gives an overview of implications for competition law enforcement after the accession, provides comments on the enforcement capacity, overview of noteworthy amendments to the Competition Act as well as some other new legislative instruments related to the competition sphere. In addition, it discusses several important issues related to standards applied in the assessment of merger cases, and instruments necessary for the cartel enforcement. Last but not least, it explains changes in competencies for the Croatian Competition Authority.

Keywords: Competition, Croatia, agency efficiency, cartel enforcement, consumer, courts, damages actions, European Competition Network (ECN), merger control, OECD, state aid control.

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Croatia as the 28th EU Member State: Impact on Competition Policy

*Bojana Vrcek*¹

Introduction

On July 1, 2013 Croatia joined the European Union as its 28th member state. This was a truly fantastic achievement after nine years of sometimes difficult negotiations. The scope of EU conditionality has been more stringent than for previous East European states. These demands impelled the Croatian authorities to accept many needed reforms. I believe Croatia's accession will serve as an impetus for all non-EU neighboring countries to follow suit. Now is time to focus on the economic recovery and attracting investments, which is not an easy task these days.

I conducted research on the potential benefits and broader implications of Croatia's EU accession on its competition policy and enforcement. Specifically, I examined the newly amended Croatian Competition Act, consumer organizations and their activities, and the enforcement record of the Croatian Competition Authority (CCA)², including state aid matters. I compared Croatia's experience with that of states that joined the EU between 2004 and 2007. Many view Croatia's EU accession as public good and necessity.

What legislative changes has Croatia introduced? What shall the competition community expect from the EU membership?

There is a wide consensus that competition is an essential element fostering innovation, productivity, and growth in a functioning market economy. In addition to the economic benefits,

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² More information available at www.aztn.hr

competition law can promote democracy.³ Though not explicitly recognized by legislators, it played an important historical role in the EU integration process. Thus, the acceptance of EU competition law as a crucial part of the *acquis communautaire* has been central to finalization of the European single market.⁴ Accordingly, Article 36 of the Accession Treaty⁵ required the European Commission to monitor closely all of Croatia commitments, particularly competition policy in the accession negotiations.

Possible implications for competition policy and enforcement

The Croatian competition regime is already harmonized with substantive EU competition rules in most areas. The legislature recently enacted revisions of the Competition Act, which adopt procedural standards required by the Regulation 1/2003⁶. This enables direct application of Articles 101 and 102 of the TFEU in Croatia.

The Croatian Competition Authority will become a member of the European Competition Network (ECN) and fully participate in its work. The ECN coordinates cross-border cases in the EU. It enables and requires the National Competition Authorities (NCAs) to exchange information and inform each other of proposed decisions, pool their experience, and share best practices. The CCA will have easier access and communication with the Directorate General for Competition at the European Commission (DG COMP) and the NCAs. The CCA has been participating as an observer to the ECN during the negotiations process, and I expect more robust participation in the wake of EU accession. The CCA will have the option to use evidence gathered by the European Commission. The European Commission has jurisdiction to use its investigative powers for cartels,

³ See Niels Petersen, Antitrust Law and the Promotion of Democracy and Economic Growth, Preprints of the Max Planck Institute for Research on Collective Goods Bonn 2011/3, January 2011, p. 2, available at http://www.coll.mpg.de/pdf_dat/2011_03online.pdf

⁴ See, Eleonor. M. Fox, The Central European Nations and the EU waiting room - why must the central European nations adopt the competition law of the European Union?, Brooklyn Journal of International Law (BJIL), 1997-1998, at p. 351.

⁵ See <http://register.consilium.europa.eu/pdf/en/11/st14/st14409.en11.pdf>

⁶ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 1, 04.01.2003, p. 1-25.

abuse of dominance and mergers over the entire European Union. Thus, this jurisdiction will be extended to Croatia. I predict that this may lead to more active cartel prosecution in Croatia, which has been relatively weak. In contrast to other small market economies, the CCA has issued only few decisions against cartels of local bus operators, bread producers or driving schools.

The most recent Competition Act in 2009⁷ empowered the CCA to impose fines for infringements of competition rules directly, without going to the court. This is analogous to the European Commission's power to impose fines. Previously, only the Croatian misdemeanor courts could impose fines. Misdemeanor courts waited until administrative courts issued a judgment when CCA's decisions were appealed. These caused delays which often exceeded the statute of limitations. Thus the misdemeanor courts rarely issued fines. Though the revisions of the entire fining system significantly empowered the CCA, it has exercised its new powers in a limited fashion.

The 2009 Competition Act eliminated several procedural ambiguities related to the issuance of warrants for dawn raids. Due to these difficulties, the CCA has never used the dawn raid since it was introduced in October 2010. Other Eastern-European member states' agencies enhanced enforcement activity and issued more fines after their EU accession. The support from the EU likely instilled a sense of duty in the NCAs to examine the enforcement in other member states, and, I suspect, compare their records. As Croatia moves along that course, domestic companies must work on their compliance programs. The increased cartel prosecution and compliance may benefit consumers.

This segues to the consumer welfare standard, which the CCA seems to have neglected in the past. I suspect the CCA does not feel responsible for considering consumer welfare because it traditionally has been out of the scope of the Competition Act. Interestingly enough, the CCA recently held a press conference regarding an ongoing investigation of a major merger between the supermarket conglomerates *Agrokor* and *Mercator*, who have combined revenues of over seven billion euros.⁸ This CCA held this press conference prior to receiving the merger notification, which is

⁷ Zakon o zaštiti tržišnog natjecanja, Official Journal NN 79/2009.

⁸ Agrokor, is a dominant Croatian firm in both food production and retail, thus creating vertical and horizontal concerns. Mercator is Agrokor's Slovenian counterpart, which also does significant business in Croatia.

unusual. A CCA representative stated that, "consumers are not a problem at all, we care about the suppliers. Those will have a problem if they can't supply Agrokor".⁹

The CCA appears to focus primarily on vertical foreclosure, which I support. However, I wonder why the representative explicitly disclaimed concern for consumers. Regardless of its motivation, the CCA announced that it will likely grant a clearance to the merger, conditioned on structural remedies, specifically a divestiture of some grocery stores and supermarkets.

Hopefully, further convergence with the EU standards will prompt the CCA to consider consumer welfare standard in future assessments. I believe that competition law enforcement in the food retail sector is complex, but also important.¹⁰

In addition to considering consumer welfare, EU accession requires CCA and notifying undertakings to consider the community dimension of mergers. Mergers in Croatia now fall within the scope of the EU Merger Regulation 139/2004, which requires the European Commission to assess all mergers with a "community dimension" exclusively.¹¹ However, the Merger Regulation

⁹ (...)“Najmanji je problem za potrošače. Međutim, problem je prema dobavljačima. Dobavljač koji ne može prodavati u Konzumu, on teško može prodavati u Hrvatskoj, objašnjavaju u AZTN-u posljedice Agrokorova preuzimanja Mercatora“ (...), available at <http://danas.net.hr/novac/todoric-mora-prodati-dio-trgovina>

¹⁰ For example, the Belgian Competition Auditorate issued, on January 11, 2010 a report according to which Ferrero, Lidl Belgium, Colruyt, Cora, Intermarché, groupe Delhaize, and Carrefour Belgium engaged in coordinated price increases and exchanged commercially sensitive information regarding the distribution of Ferrero's products, in breach of Article 2 APEC and Article 101 TFEU. However, due to the breach of the rights of defense, the Belgian Competition Council could not assess the case on the merits. See <http://www.cgsh.com/files/Publication/75ebe29a-10d7-4807-9972-537340418c50/Presentation/PublicationAttachment/815bf175-f645-449e-af6a-5a6bea2d5f4f/National%20Competition%20Report%20Q2%202011.pdf>

¹¹ The European Commission has exclusive jurisdiction over concentrations with a "Community dimension", which they define in Article 1 (2) and (3) Regulation 139 as those with

- the combined aggregate worldwide turnover of all the undertakings concerned is more than €5,000m; and
 - the aggregate Communitywide turnover of each of at least two of the undertakings concerned is more than €250m,
- unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

A concentration also has a Community dimension if:

- the combined aggregate worldwide turnover of all the undertakings concerned is more than €2,500m; and
- in each of at least three EU Member States the combined aggregate turnover of all of the undertakings concerned is more than €100m; and
- in each of at least three of these Member States the aggregate turnover of each of at least two of the undertakings concerned is more than €25m; and
- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than €100m,

provides a referral mechanism, which allows mergers limited to a national market (e.g. Croatia) to be referred to the respective national authority (e.g. CCA).

Croatia is not an OECD member¹², but is a member of the OECD regional network based in Budapest,¹³ which educates and organizes seminars for South-East European authorities. Croatia's role in the regional network may increase in that circle as well, which I hope will lead, along with other reforms, to eventual OECD membership. I expect that the authorities of the South-East European countries will look at the decisions of the CCA, although some already enforce competition law vigorously.

In my role as a non-governmental advisor at the International Competition Network,¹⁴ I advised the CCA on the draft amendments to the Competition Act enacted on June 24, 2013. The legislator accepted most of the amendments as part of the revised 2009 Competition Act.¹⁵ The amended Competition Act introduces damages actions for breaches of the provisions of the Competition Act in Article 69 a.¹⁶ The competence for damages actions has been given to commercial courts, which I view as a largely positive solution. Although civil courts have more expertise in damages, judges at commercial courts specialize business law.

Additionally, in contrast to the NCA's decisions, a finding of infringement by the European Commission and the CCA will be binding on the Croatian courts.¹⁷

unless each of the undertakings concerned achieves more than two-thirds of its Community-wide turnover within one and the same Member State.

¹² I believe that Croatia should work towards gaining membership with the OECD.

¹³ For more information visit <http://www.oecdhungarycompetitioncentre.org/>

¹⁴ For more information please visit www.internationalcompetitionnetwork.org

¹⁵ Zakon o izmjenama i dopunama Zakona o zaštiti tržišnog natjecanja, Official Journal NN 80/2013.

¹⁶ This provision applies to any provision and is not limited to the Croatian counterparts of the Articles 101 and 102 TFEU.

¹⁷ The broader solution is accepted by the German Competition Act in § 33 (4) Gesetz gegen Wettbewerbsbeschränkungen).

Most importantly, the limitation period will be suspended during the investigation at the CCA or the EU Commission. Unfortunately, because the CCA did not decide to propose the amendments which would regulate the limitations period in more detail, some ambiguities remain.

On June 11, 2013 the European Commission published a package of proposals aimed to advance private antitrust damage and collective actions in Europe.¹⁸ In particular, the European Commission proposed a binding Directive, which covers a number of procedural issues in private antitrust damage actions in the EU. These actions include the disclosure and use of evidence, the applicability of joint and several liability, and the availability of a pass-on defense. The Commission also issued a nonbinding recommendation urging Member States to allow private plaintiffs to seek collective relief for violations of competition and other laws under some conditions. If the proposed EU Directive on damages actions is adopted, the Croatian Competition Act (and eventually the Act on Civil Procedure¹⁹) must be amended in order to implement the additional requirements required by the future Directive.

Furthermore, the Act on Civil Procedure adopted a provision, effective July 1, 2013, which introduced a collective action in the Article 502.a for the first time in Croatia. The general public is aware of consumer collective redress and even some actions have been filed at the courts, though on other legal grounds. Because civil society and a vigorous consumer movement can play a constructive and valuable role in the development of a culture of competition, this is a welcome development.²⁰ The most widely discussed case is a collective action filed by the consumer protection organizations “*Potrošač*”²¹ (“*Consumer*”) and “*Franak*”²² against eight banks for deception.

¹⁸ All documents are available at <http://ec.europa.eu/competition/antitrust/actionsdamages/>

¹⁹ Zakon o parničnom postupku, pročišćeni tekst zakona, clean version, Official Journal NN 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 123/08, 57/11, 148/11, 25/13.

²⁰ OECD Global Forum on International Investment, Nick Godfrey, Why is competition important for growth and poverty reduction, Session 1.3.: Competition Policy, 27-28 March 2008, p. 11.

²¹ More information available at www.potrosac.hr. Additionally, “*Potrošač*” (“*Consumer*”) is a member of BEUC (The European Consumers’ Organization; www.beuc.org) ANEC (The European consumer voice in standardization; www.anec.eu) and Consumers International (Consumers International; more information available at www.consumersinternational.org). However, based on my visit to their website I have some doubts if this organization could be a potentially good discussion partner regarding competition cases.

The consumer organizations claimed that banks unlawfully used the foreign currency clauses (Swiss franc) and some other provisions on interest rates. The consequence of such a clause was an increase of principal loan amounts due to an increase of the value of the Swiss franc over the years. Most of the loans affected were long term loans. The interest rates were flexible and they grew over the years. They filed the action under the Consumer Protection Act ²³ and the Regulation on standing in consumer protection cases initiated by way of collective actions²⁴ in April 2012. The Commercial Court in Zagreb held several hearings and the judgment was delivered on July 4, 2013. The Commercial Court decided positively for consumers. However, this is a first instance decision, and the banks announced an appeal to the High Commercial Court. The speedy decision is surprising, as the Croatian courts, especially in Zagreb, are overloaded and most litigation takes well over year.

On this note, competences in the enforcement of competition law in the banking sector has changed. The authority for implementation of competition provisions over banking sector goes back in the hands of the CCA. The European Commission initiated the change. Previously, the Croatian National Bank oversaw competition law enforcement in that sector. I promoted this change in an article published 2004, and naturally support the amendments.²⁵ I believe the CCA has more expertise and legitimacy to enforce competition law than the (Croatian) National Bank, despite the latter having specific knowledge on the sector. Furthermore, the two institutions have been responsible for substantially different roles. However, a close cooperation between those two institutions will be needed and welcome.

Because the competence for State aid control will be exclusively under the European Commission after the accession, the state aid matters will also reflect changes of competencies. The CCA made 30 decisions in the field of State aid, 13 of which involved aid schemes and 17 concerned individual

²² More information available at <http://udrugafnanak.hr/>

²³ Zakon o zaštiti potrošača, Official Journal NN 79/07, 125/07, 75/09, 79/09, 89/09, 133/09.

²⁴ Uredba o određivanju osoba ovlaštenih zapokretanje postupka radi zaštite kolektivnih interesa potrošača, Official Journal NN 124/09.

²⁵ Bojana Vrcek, Croatian and EC Competition Law: State and Problems of the Adaptation Process, in: European Business Organisation Law Review (EBOR), 2:2004, p. 382.

aid measures.²⁶ The CCA will maintain an advisory role and will continue to cooperate with the Commission. Consequently, the Croatian legislator enacted a new State Aid Act which governs the state aid policy and competences of the Croatian state in state aid cases, procedure preceding a grant of a state aid, registry of state aid and obligation of reporting to the European Commission on state aid matters on June 10, 2013.²⁷ Croatia has had a relatively large number of subsidized companies, many of which need restructuring. The European Commission must approve such restructuring in accordance with the EU State aid rules. These often are painful, but needed. Previous governments have postponed restructuring for far too long in order to maintain social peace. Now, many Croatians may unfairly blame Brussels. This reminds me of the words a former Prime minister of Italy, professor Mario Monti delivered during his presentation on the EU Competition Forum in February 2013. He stated that national and local politicians must be reminded not even to try to blame the EU for their domestic affairs, which he has never done.²⁸

Conclusion

When competition policy is part of an open and well-regulated economy, it encourages both direct foreign and domestic investment because it increases investor confidence by setting a consistent framework for the business sector to operate. However, proper laws are not enough. Competition law needs appropriate supporting policies, and, most importantly, effective enforcement. Thus, the CCA may need additional personnel. Currently, it employs 57 people, including 21 lawyers and 24 economists.²⁹ The shrinking public budget combined with increased demands on the state makes it

²⁶ Communication from the Commission to the European Parliament and the Council on the Main Findings of the Comprehensive Monitoring Report on Croatia's state of preparedness for EU membership {SWD(2012) 338 final}, Brussels, 10.10.2012, COM(2012) 601 final, p. 6.

²⁷ Zakon o državnim potporama, Official Journal NN 72/2013.

²⁸ Keynote speech, Prime Minister Italy, Mario Monti, the Prime Minister Monti called for a '**code of conduct**' for European leaders: "Stop blaming Brussels for the each and every unpopular measure a government needs to take – this is ludicrous". Speech available at http://ec.europa.eu/competition/forum/2013/index_en.html

²⁹ Information available at <http://www.aztn.hr/o-nama/33/strucna-sluzba/>

difficult for CCA to persuade Parliament to increase its budget. Nonetheless, as professor Kovacic³⁰ noted, the CCA has proved to be efficient, but winning larger impact cases would be even better.

The Croatian representative in the European Commission, Mr. Neven Mimica, has been appointed as the Commissioner for consumer protection. Consumer protection is an important portfolio, which demands cooperation with other Commission's Directorates on a regular basis. It is difficult to predict whether the fact that Croatian Commissioner is in charge of the consumer protection for the EU will impact on the domestic policies. Nonetheless, the EU entry will certainly create opportunities for many stakeholders.

³⁰ William E. Kovacic, Rating the competition agencies: What constitutes good performance?, remarks presented at the George Mason Law Review Twelfth Annual Symposium on Antitrust, Washington, D.C., Dec. 4, 2008, available at <http://www.ftc.gov/speeches/kovacic/2009rating.pdf>; see also David A. Hyman & William E. Kovacic, Institutional design, agency life cycle and the goals of competition law, p. 2169, available at http://fordhamlawreview.org/assets/pdfs/Vol_81/Hyman_April.pdf