Concentration Control in Croatia*

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To my beloved mother
Boris Štritof

1. Introduction

The legislation of the Republic of Croatia has not, until relatively recently, dealt with issues of concentration control, nor has it dealt with competition law issues in general. It was not until 1995 that the Croatian Parliament adopted the Law on Protection of Market Competition[1] (hereinafter: Competition Law).[2] This Law was amended in 1997 and 1998.[3] The Competition Law deals with, among other competition issues, issues relating to control of concentrations in Articles 21 to 26.

Article 49 of the Croatian Constitution provides the constitutional basis for adopting the Competition Law. Paragraph 1 of this Article provides that entrepreneurial and market freedoms are foundations for the economic organization of the Republic. Moreover, Paragraph 2 stipulates that all entrepreneurs are

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1 Although the authors are aware that the English name of the law is not fully appropriate and that at least the word 'market' should be omitted, it is the official translation of the name of the law in Croatian and therefore is used throughout the text. Likewise, in this text the competition authority is named 'Agency for the Protection of Market Competition' as that is also the official English term for that institution. It would be advisable that in the new legislation, which is being prepared, the competition authority be called 'State Competition Agency' [Dr Žavna agencija za konkurenciju] or similarly.

2 Official Gazette No. 48/1995; D. Mlikotin Tomić, '*Svrha, zadaci i dosadašnja praksa primjene Zakona o zaštiti tr Žišnog natjecanja*' [Purpose, Tasks and Contemporary Practice Regarding the Application of the Law on the Protection of Market Competition] in *Primjena Zakona o zaštiti tr Žišnog natjecanja* [Application of the Law on the Protection of Market Competition] (Agencija za zaštitu tr Žišnog natjecanja, Zagreb, 1997) pp. 9 et seq.

3 Official Gazette No. 52/1997 and No. 89/1998.

European Journal of Law Reform, Vol. 3, No. 4

guaranteed equal legal status on the market, with the prohibition of monopolistic behaviour (prohibition of abuse of monopolistic position). Finally, Paragraph 3 states that the Republic stimulates economic progress and social welfare and takes care for the economic development of all regions.

It should be noted that the Croatian Competition Law has been inspired by the EU legislation. Nevertheless, there are some important differences and, furthermore, competition issues are a novelty in the Croatian legal system and therefore there are many points that still have to be addressed, primarily through the practice of the national competition authority.

The work on further harmonization of the legislative framework of competition protection in Croatia has already started. The Action Plan for European Integration made by the Government of Croatia provides that, as far as concentration control is concerned, the primary obligation is to develop a system of concentration evaluation, which corresponds to the basic principles of the European Community.[4]

By signing the Stabilization and Association Agreement with the European Communities and their Member States on 29 October 2001, Croatia has undertaken the obligation of starting the approximation of its existing legislation in the field of competition to that of the European Community.[5]

Following the obligations under the Agreement concerning competition issues,[6] preparations for the new competition legislation have already started in the relevant Croatian institutions. In this paper the existing drafts of the new legislation shall not be discussed, since none of them is yet official. Rather an attempt will be made to give an overall presentation of current provisions and practice concerning concentrations with necessary proposals aimed at improving the controlling concentration and making it fully compatible with the legislation of the European Community.

2. Organizational Structure of the Agency for the Protection of Market Competition

Article 27 of the Competition Law provides for an independent competition authority, the Agency for the Protection of Market Competition (hereinafter: the Agency). The Agency is responsible for performing all professional and administrative tasks related to the protection of market competition pursuant to the

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4 Government of the Republic of Croatia (Office for European Integration), *Action Plan for European Integration* (Zagreb, September 1999) p. 160.

5 Article 69(1) of the Stabilization and Association Agreement between the European Communities and their Member States and the Republic of Croatia.

6 See in particular Articles 40, 69 and 70 of the Agreement. See also Articles 27 and 35 of the Interim Agreement.

provisions of the Competition Law. According to Article 28 of the Competition Law, the Agency is fully independent in performing the tasks set out in the Competition Law, and directly responsible to the Croatian Parliament. The jurisdiction of the Agency covers the control of agreements (cartel agreements and concerted practices), abuse of monopolistic and dominant positions and the control of concentrations. A Director, who is appointed to and released from the duty by Parliament, manages the operation of the Agency for a period of four years and may be re-appointed.[7]

The Agency effectively started to perform its tasks in 1997, after the Croatian Parliament has, by its decisions in 1996 and 1997 in accordance with Articles 28 and 29 of the Competition Law, appointed the Agency's Director,[8] and ratified the Charter (Statute) of the Agency.[9]

The Agency established a Council for the Protection of Market Competition (hereinafter: the Council) consisting of nine members, one of which is the President. The Government of Croatia appoints the President and the members of the Council, from among distinguished and recognized legal and economic experts in the field of competition, proposed by the Director of the Agency. Members of the Council are appointed for a period of four years and may be re-appointed.[10]

The Council is the Agency's advisory body with the task to, *inter alia*, (i) appraise reported concentrations and their compliance with the competition law, (ii) decide on the existence of prohibited concentrations and (iii) monitor the implementation of concentrations.[11] The Council proposes to the Director of the Agency the measures to be taken in order to protect market competition.[12] Hence, according to the Competition Law, the role of the Council is primarily advisory. Nevertheless, the Director has so far in his official decisions followed the proposals of the Council.

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[7] Article 29 of the Competition Law.
[8] Official Gazette No. 97/1996.
[9] Official Gazette No. 65/1997.
[10] Article 31 of the Competition Law.
[11] Since 1997, when Agency effectively started to function, the number of notified and appraised concentrations has been increasing. In 1997, only 3 decisions concerning concentrations were rendered, in 1998 there were 17, in 1999, the Agency made 35 decisions and 42 decisions were made in 2000. In 2001, until November of that year, the Agency made only 4 formal decisions but there are a number of cases pending. Interestingly enough, out of 101 decisions only 2 were negative, prohibiting the concentrations. At the same time, it should be stressed that some positive decisions (clearances of concentrations) were subject to certain commitments from the parties. These decisions are, however, statistically not considered separately from unconditional clearances, since the Competition Law unfortunately does not expressly provide for the possibility of making a formal decision with commitments or obligations. Nevertheless, the practice of the Agency has been to order the parties to follow some behavioural or structural remedies and the implementation of the concentrations concerned were subject to fulfilling such obligations. The issue is further elaborated *infra*.
[12] Article 30 of the Competition Law.

3. Scope of Application of the Competition Law to Concentrations

3.1. General

It is obvious that the Competition Law does not require mandatory notification of all concentrations. In fact, only concentrations falling under the scope of the Competition Law are to be notified to the Agency.

In general, the Competition Law shall, in accordance with Article 2, apply: (i) to companies, sole traders and craftsmen, as well as to other legal or natural persons who through their economic activities participate in the trade of goods and services; (ii) to each legal or natural person engaged in a single or temporary trade of goods and services; (iii) to any legal or natural person whose registered office and residence is in a foreign country, provided that his/her participation in the trade of goods and services has an effect on the domestic market. Nevertheless, the Competition Law provides, in Article 4, that its provisions will not apply to legal or natural persons who have, pursuant to special legal provisions, been entrusted with the task of performing public services, or have been granted special and exclusive rights or concessions, in so far as the application of the Competition Law would prevent the accomplishment of the tasks which are established by special regulations and for which they were founded. Moreover, Article 5(2) of the Competition Law stipulates that it shall not apply to transactions and contracts which do not affect the domestic market, and which do not have an adverse effect on the interests of other domestic entrepreneurs taking part in operations, both on the domestic and the international markets, unless international agreements signed by the Republic of Croatia stipulate otherwise.

The Competition Law applies to all competition issues in general and the Agency is the competent authority to deal with those issues, unless specific laws provide otherwise. For telecommunication matters the competent authority is the Croatian Telecommunications Institute and the competent authority for energy matters is the Council for Regulation of Energy Activities.[13] The relevant laws provide, however, that the competition authorities for those specific sectors are to cooperate with the Agency in competition issues. The Council for the Regulation of Activities in the Energy Sector has not yet been set up and has not started its activities. It should nevertheless be stressed that while the Croatian Telecommunications Institute has been established, it is not yet officially in operation. Consequently, the competition issues in those specific sectors have effectively been put on hold.

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[13] See Article 31 of the Telecommunications law (Official Gazette No. 76/1999, 128/1999, 68/2001) and the Law on Regulation of Activities in the Energy Sector (Official Gazette No. 68/2001).

3.2. Notion of Concentration

3.2.1. General

Article 21(1) of the Competition Law refers to, for the purpose of defining the relevant forms of concentrations, the provisions of the Company Law.[14] A concentration of entrepreneurs shall be deemed to arise by integration, affiliation, merger, or consolidation or through the acquisition of a majority shareholding or a majority of the voting rights, pursuant to the provisions of the Company Law and other legal provisions. According to the clear wording of Article 21(1) of the Competition Law shall recognize only the forms of concentrations provided for by this law in combination with the Company Law as well as other legal provisions, such as the law of obligations. Therefore, it is appropriate to provide the definition of all the possible forms of concentrations provided by the Company Law.

3.2.2. Integration

Article 503 of the Croatian Company Law essentially provides that the shareholders' meeting of a stock corporation or limited liability company (integrated company) may resolve to integrate the company into another stock corporation with domestic domicile (principal company) if all shares of such company are held by the prospective principal company. There are two possible forms of integration. The first possibility requires that the prospective principal company hold 100 per cent of the shares of an integrated company. The second possibility requires that the prospective principal company hold at least 95 per cent of the shares of an integrated company.

3.2.3. Merger

Article 512(1) of the Company Law provides for the notion of merger of companies. According to the notion of merger, it is fundamentally understood that, one or more companies merge with another company (the acquiring company), such that the acquired companies become a part of the acquiring company. This process can be performed without a prior liquidation procedure so that the shareholders (i.e., the members of the acquired companies) obtain shares in the acquiring company in exchange for their shares in the acquired company. Moreover, the acquired companies transfer all their assets and liabilities to the acquiring company. Acquired companies cease to exist as separate legal entities but in practice they continue to exist as part of the acquiring company.

3.2.4. Consolidation

Article 512(2) of the Company Law provides for the notion of consolidation of

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[14] Official Gazette 111/1993, 34/1999, 121/99, 52/00 (Decision of the Constitutional court).

companies. In essence, consolidation means that two or more companies are founding the new company into which they transfer all their assets and liabilities and thereby cease to exist without a prior liquidation procedure. The shareholders replace their shares in the consolidated companies with shares of the newly founded company and therefore become shareholders and members of that new company.

The basic difference between merger and consolidation is that, after the merger, one of the companies taking part in the transaction continues to exist while, by contrast, after the consolidation, all companies taking part in the transaction cease to exist and the new company emerges. Consequently, consolidation results in the foundation and incorporation of the new company.

3.2.5. Affiliation

The Company Law provides that affiliation exists between the companies which, in relation to each, other may be

- parent company and subsidiary company,
- controlled company and controlling company,
- members of a company group,
- companies with cross shareholdings or
- parties to an enterprise agreement.[15]

PARENT COMPANY AND SUBSIDIARY COMPANY

The relationship between a parent company and its subsidiary exists in cases of majority holding, which comes in two forms: the parent company either holds the majority of the shares in another company or it holds the majority of the voting rights in it.[16] Special rules apply to determining shares which a company is holding in another company. It is provided that shares held by one company in another company are deemed shares held in the latter by another company, the majority of whose shares are held by the first company.[17]

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[15] Article 473 of the Company Law.

[16] Article 474 of the Company Law.

[17] Acquisition of 25 per cent of voting rights does not in itself, naturally, mean that a parent/subsidiary relationship arises. However, the Law on Procedure of the Takeover of Joint Stock Corporations (Takeover law – Official Gazette of the Republic of Croatia No. 124/1997) prescribes that any legal entity or individual who on any basis except inheritance acquires the shares of a joint stock corporation and thereby obtains more than 25 per cent of the voting rights in the general shareholders' meeting of that joint stock corporation is required immediately to inform the Commission for Securities of the Republic of Croatia of the acquisition and within 7 days from the day of the acquisition is obliged to make an offer to acquire all the remaining shares of the corporation, i.e., to make a tender offer for takeover. Consequently, it should be deemed that a person acquiring more than 25 per cent of the voting rights might eventually hold all or at least a majority of the votes in another company, thus giving rise to a concentration. Therefore, the Council for the Protection of

CONTROLLED COMPANY AND CONTROLLING COMPANY

A controlled company is one over which another company (the controlling company) is in a position to exert a controlling influence.[18] To determine whether a company is controlling another or that one is being controlled, it is not essential that the controlling company actually exert its controlling and decisive influence. Rather it is sufficient that such influence can be exerted and it is for the controlling company to decide if and when that influence shall be exerted. The controlling influence must be based on the institutions and provisions of corporate law. No matter how great, if the influence is based on a relationship between two companies that is merely contractual in nature is not sufficient to constitute the decisive influence within the meaning of company affiliations.[19] It is presumed that a parent company controls its subsidiary. However, that presumption may be refuted as it may be proven that a parent company is not able to exercise controlling influence over its subsidiary. This may be so due to the various possibilities of internal organization of commercial companies, which may alter the usual causal links between the percentage of shares held and the percentage of voting rights.

COMPANY GROUPS AND MEMBERS OF GROUPS

A typical group of companies[20] is deemed to exist if one controlling and one or several controlled companies are subject to common management. The controlled companies are considered to be members of that company group. In two cases, the law provides for a conclusive presumption that companies are subject to joint management, that is, that they form a group of companies. The reason for this is that if companies are parties to a control agreement or if one company has been integrated into another, although maintaining its separate legal identity[21]. On the other hand, there is a refutable presumption that a controlling and a controlled company constitute a company group.[22]

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cont.
Market Competition has concluded that the Agency must be notified of a concentration as soon as any person acquires more than 25 per cent of the voting rights in a joint stock corporation which in turn places him/her under the obligation to make a tender offer. This conclusion was made at the 41st session of the Council held on 30 January 2001.

18 Article 475 of the Company Law.

19 That statement, however, does not mean that a contractual relationship could not lead to concentrations within the meaning of the Competition Law.

20 The Croatian term in the Company Law for a group of companies is '*koncern*' and is taken from the German law.

21 The concept of control agreement is discussed below. The notion of integration was explained *supra*.

22 Article 476 (1) of the Company Law.

COMPANIES WITH CROSS-SHAREHOLDINGS

Companies with cross-shareholdings are considered companies that are affiliated in that each of them is holding more than one quarter of the shares in the other company. In determining the number of shares held by one company in another company the same rules for determining majority holding apply. The role of the rules on companies with cross-shareholdings is primarily to protect the interests of the relevant companies and their shareholders and is thus in the scope of corporate law. Nevertheless, cross-shareholdings are important also to determine the emergence of concentrations since all forms of affiliation of companies according to the Company Law are covered by the provisions of the Competition Law.

ENTERPRISE AGREEMENTS

The Company Law provides for several enterprise agreements. These are:

- agreements by which a company submits the management of the company to another company (control agreements);
- agreements by which a company undertakes to transfer its entire profits to another company or agreements by which a company agrees to perform its business operations on behalf of another company (profit-transfer agreements);
- agreements by which a company undertakes to pool its profits or profits of its certain business operations in whole or in part with the profits of other companies or certain business operations of another company (profit-pool agreements);
- agreements by which a company undertakes to transfer a part of its profits or the profit of its certain business operations in whole or in part to another person (agreements on transfer of a part of profits);
- agreements by which a company leases the operation of its business to another person (agreements to lease operations) and
- agreements by which a company surrenders the operation of its business to another person in the manner different than by lease (agreements to surrender operations).

3.2.6. Other Forms of Concentrations

From the above, it appears that all forms of affiliation of companies, being at the same time expressly stipulated as forms of concentrations under the Competition Law, are caught within the notion of affiliated companies, pursuant to the Company Law. As a consequence, it might be presumed that there is no reason for the Competition Law to separately stipulate acquisition of majority shareholding, acquisition of majority voting rights, and affiliation. In other words, the provision of Article 21(1) of the Competition Law, which stipulates that a concentration of entrepreneurs shall be deemed to arise by merger, consolidation and affiliation, would be sufficiently precise and understandable.

The question arises whether a concentration exists, under the Competition Law, in a situation in which one undertaking acquires part of another undertaking, and in which the acquired part is not a separate legal entity. Likewise, it is questionable whether the notion of concentration includes a situation in which an entrepreneur acquires an operational business unit performing part of the whole business operation of that entity (assets, facilities, rights and obligations resulting from performance that business activity, including all rights and obligations arising from labour relationships[23]). These situations have not been expressively determined to be cases of concentration provided by the relevant provisions of the Company Law. Nevertheless, the practice of the Agency has recognized these forms of concentrations as falling within the scope of Article 21(1) of the Competition Law.

In the case *Privredna banka Zagreb d.d./Atlas American Express*,[24] the travel agency Atlas d.d. sold the part of its business related to the credit card business operations to Privredna banka Zagreb. The Agency determined that the transaction in question constituted a concentration and therefore it started the procedure of investigation and appraisal of the concentration. The concentration was cleared on 9 June 1999.

In the case *HIPP & Co./Cedevita d.o.o.*[25] Hipp & Co. purchased the business of Cedevita d.o.o. in connection with food for infants by acquiring assets, rights of industrial and intellectual property, know-how and business secrets related to that business, which made up only part of the business operations of Cedevita d.o.o. The parties involved in the concentration were the acquiring undertaking and the part of the undertaking Cedevita d.o.o. related to the production of food for infants. The concentration was cleared on 12 September 2001.

3.3. The Notion of Turnover

3.3.1. Problems in Interpreting the Provisions of the Competition Law

According to Article 22(1) of the Competition Law the concentration shall be deemed to fall within the scope of the Competition Law when: (i) the aggregate yearly turnover of goods and services of all entrepreneurs taking part in the concentration exceeds the amount of HRK (*kuna*) 700 million[26] in the accounting period preceding the concentration; (ii) when the aggregate yearly turnover of goods or services of each, or at least two, of the entrepreneurs taking part in the concentration exceeds the amount of HRK 90 million[27] in the accounting period

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[23] It is to be noted that rights and obligations in such transactions are by virtue of Article 129 of the Labour law (Official Gazette No. 38/1995, 54/1995, 65/1995, 17/2001) transfered on the acquiring undertakings by operation of law.

[24] Case No. UP/I-030-02/99-01/10, Official Gazette No. 91/1999.

[25] Case No. UP/I-030-02/2001-01/80, Official Gazette no 86/2001.

[26] Approximately 92 mio. EUR in November 2001.

[27] Approximately 12 million EUR in November 2001.

preceding the concentration. The aggregate turnover of the undertakings taking part in the concentration shall be determined according to the provisions of the Accounting Law.[28]

The provision of Article 22(1) is not entirely clear and may lead to different interpretations. Namely, two interpretations are possible: either the thresholds for notification of the concentrations have to be fulfilled alternatively or they must be fulfilled cumulatively. Consequently, the Agency has changed its practice. According to its former practice, the two conditions provided by the Competition Law were understood to apply separately. Thus, the concentration would fall within the scope of the application of the Competition Law (i) if the aggregate yearly turnover of goods and services of all entrepreneurs taking part in the concentration exceeded the amount of HRK 700 million in the accounting period preceding the concentration, or (ii) if the aggregate yearly turnover of goods or services of each, or at least two, of the entrepreneurs taking part in the concentration exceeded the amount of HRK 90 million in the accounting period preceding the concentration.

However, that practice proved inadequate, taking into account the size of the undertakings involved in concentrations, and became an excessive burden on the Agency to appraise concentrations which in fact could not threaten effective competition in Croatia. In addition, it was not undoubtedly clear whether the intention of the legislator really was to provide for application of the Competition Law in the manner it had been applied in the early practice of the Agency. For these reasons the practice changed following the decision of the Council made at its 44th session held on 24 April 2001. The Council concluded that Article 22(1) contain preconditions for obligatory notification of concentrations which have to be fulfilled cumulatively since the size of the concentration in itself *prima facie* represents a possible threat to competition. In addition, it is the view of the Council that in cases where those conditions are not fulfilled, the Agency has the power to initiate proceedings to appraise the concentration and require the parties involved to notify the concentration if the Agency believes that the concentration might lead to a significant impediment to competition taking into account the market shares of the parties involved before and after the concentration.

The decision of the Council deserves some remarks. On the one hand, it can be argued that the Council goes beyond its powers expressly stated in the Competition Law. On the other hand, its decision and the actual interpretation of the law seems to be adequate and in line with the reasonable approach. The entrepreneurs have expressed their satisfaction with the decision and the resulting practice of the Agency. For these reasons it is the view of the authors that it is appropriate for the Competition Law to be amended to reflect the decision of the Council.

3.3.2. Calculation of Aggregate Turnover

It must be stressed that the notion of 'aggregate turnover', as provided in Article 22

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[28] Official Gazette No. 90/1992.

of the Competition Law, has not been specifically defined. Namely, potential parties to the future concentrations might raise the question of the exact meaning of the notion 'aggregate turnover'. It is well known that the notion 'aggregate turnover' might refer to either worldwide turnover or turnover within the limits of the national jurisdiction where the possible concentrations may occur or where the concentrations may have an impact on the market. Therefore, a specific definition of the aggregate turnover will make a great deal of difference in the process of deciding whether the possible concentrations actually enter the scope of application of the Competition Law.

It is particularly important in cases involving foreign investors who do not have any assets or ongoing business operations in Croatia, or whose aggregate turnover on the Croatian market is below the provided thresholds. Where such investors wish to acquire a domestic enterprise, the aggregate turnover of the investing enterprise, calculated on the basis of the business operations within the Croatian market, might not be enough for the concentration to enter the scope of application of the Competition Law. Nevertheless, such an investing undertaking might have a large aggregate turnover, that is, a strong market position within the worldwide market or Community-wide market, or within the national market where the undertaking concerned conducts its main business operation. Therefore, if the Agency applies the notion of 'aggregate turnover', within the meaning of the worldwide aggregate turnover, it is foreseeable that a greater number of possible concentrations would fall within the scope of application of the Competition Law. In this way the much higher level of the protection of the structure of the Croatian market would be achieved, unlike the situation where the notion of the 'aggregate turnover' is calculated on the basis of the ongoing business operations within the limits of the Croatian market.

Consequently, the approach of the Agency regarding defining 'aggregate turnover' pursuant to the Competition Law is that the 'aggregate turnover' is understood and dealt with as worldwide aggregate turnover. That approach has been consistently followed in the practice of the Agency in all cases of concentrations.

Following this line of reasoning, if the concentration in question concerns domestic undertakings that perform their business operations on the world market, the aggregate turnover will be understood as their worldwide aggregate turnover. Naturally, if the concentration in question concerns two or more domestic undertakings which perform all of their business operations within the limits of the domestic market, the notion of the 'aggregate turnover' is understood as the aggregate turnover achieved within the limits of the Croatian market.

Special rules apply to calculating turnover in cases of concentrations of banks and insurance companies. Nevertheless, these rules are not statutory provisions of the law, but have been developed in the practice of the Agency. Following the decision of the Council made at its 47th session of 3 July 2001, for concentrations involving banks, the sum of the total income of the parties to the concentration is used instead of turnover, and it is calculated in accordance with the decision of the Croatian

National Bank.[29] In cases involving concentrations of insurance companies the aggregate worldwide turnover is replaced by the value of the gross premiums under contract by the parties to the concentration. It is to be noted, however, that with respect to that issue, the Council has not made any formal decisions. Nevertheless, the Agency has in practice consistently applied these principles.

4. Notification of Concentrations

4.1. Notion of 'Notification of Intended Implementation of a Concentration under the Competition Law'

Article 22(1) of the Competition Law states that entrepreneurs are required to notify the Agent of their intention to create a concentration if the statutory thresholds are met. The questions that arise are first what is to be understood by the notion of 'the notification of intended implementation' and, therefore, when exactly are the parties of the concentration required to give notification of the possible concentration. If the law is not clear, the parties actually cannot know or cannot be sure of when their obligation to give notification of the concentration arises and that likely leads to non-observance of their obligations, and the parties can easily make an excuse for not having given notification of the concentration due to ambiguity in the legal provisions. In any case, uncertainty brings legal uncertainty and in general creates a bad environment for business activities and economic development.

The practice shows that in some cases the parties to a concentration give notification of the intended creation of that concentration immediately after they decide on a transaction which leads to a concentration. In this situation the parties would actually require the Agency to deliver a formal, preliminary opinion about the possible outcome of the appraisal of the concentration before taking any formal activities concerning the implementation of the transaction to follow. Some parties of the concentration notify the Agency of an intended concentration after signing the letter of intent or memorandum of understanding. In other cases, the parties might give notification of the concentration after the transaction has been completed, that is, after the parties have become shareholders of the acquired company. In the latter case it is obvious that the parties in fact do not give notification of their intent to create the concentration, but rather of the previously created concentration. Additionally, some parties conclude a contract which includes a clause that the validity of the contract depends upon the Agency's clearance of the concentration in question. The parties would then submit such a contract as the basis for the notification of the intended concentration. The latter approach is the most accepted

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[29] Official Gazette No. 57/1999, 3/2001. In practice, the way in which the Agency calculates the income corresponds to the manner in which the total income of financial and credit institutions is calculated pursuant to the EU Merger Regulation.

by practicing lawyers. Finally, in some cases no notification of the concentrations is given at all. In these cases, the Agency submits to the parties the formal request for notification of the concentration in question. Clearly, this is possible only if and when the Agency *post festum* finds out about an existing concentration.

Each of the cases described above have appeared in the practice of the Agency and clearly show the range of understandings of the provisions of the Competition Law.

An additional problem is that the Competition Law has not at all provided a time-period for the notification of the intended concentration. There are no provisions which expressly state or at least give guidance in determining at what moment before the implementation of the transaction leading to a concentration of undertakings the notification is to be submitted to the Agency. For example, at what point after concluding a share-purchase agreement or after making a public bid for acquisition of shares is the intent to create the concentration to be notified? This is clearly contingent on it having previously been established that concluding the contract or publishing the tender offer, as the case may be, is the relevant moment for giving notification of the concentration.

It seems appropriate to conclude that by using the notion 'notification of the intent to create the concentration' in Article 22(1) of the Competition Law the legislator intended that the concentration should be notified before its actual implementation. In this way the Agency would have an opportunity to prevent possible concentrations and it would not be placed in a position to act when the concentration in question has already started to produce legal effect, changing the structure of the relevant market.

In the absence of specific and clear regulations in that respect and in an attempt to prevent different readings and subsequent different actions by various parties, the Agency has in practice started to require that notification of concentrations be submitted as soon as possible after conclusion of a transaction leading to a concentration, for example, after entering into a share purchase agreement.

Nevertheless, since undertakings still do not regularly give notification of concentrations and since the practice of the Agency has not been confirmed by any legal provision, some assistance to the Agency, in at least the harmful effects introduced by the concentration on competition, may be found at Article 36a of the Competition Law. That provision empowers the Director of the Agency to issue an interim measure when the distortions on free competition are threatening to cause direct damage to the entrepreneurs, to particular economic sectors or to consumer interest. The interim measure issued will not prejudice the final decision of the Agency, and will have limited duration. Thus, the Agency has the power to suspend the full implementation of the concentration until a final decision is made.

To conclude, and without prejudice to the well-established intention of the legislator to give notification of the concentration at the earliest possible moment, the principles of legal certainty and equal protection of the parties would definitely require the question of mandatory notification to be addressed in a more specific manner.

4.2. Who is Obliged to Notify the Concentration

Article 22(2) of the Competition Law provides that notification shall be submitted in writing by all participants to the concentration, or by the entrepreneur who would gain controlling influence after the creation of the concentration.

Furthermore, the Bylaws on the Methods of Keeping a Register on Concentrations[30] (hereinafter: the Bylaws), in Article 6, expressly provide which person is required to give notification of the concentration in every specific situation. This Article stipulates that in the cases of mergers or consolidations, notification of the concentration shall be submitted by the owner or the representative of the acquiring company or the official representative of the newly-established, consolidated company. In cases of acquiring a majority shareholding or the majority of voting rights, the majority shareholder or the holder of the majority of the voting rights shall submit the notification. If the majority shareholding or the majority of voting rights is acquired through public bid, the bidder shall submit the notification of the concentration. In all other cases, the notification shall be submitted by all the participants to the concentration, or by the persons authorized by the participants.

4.3. Register of Concentrations

In accordance with Article 23(1) of the Competition Law, the notification of the intended implementation of a concentration shall be submitted to the Agency for the appraisal and entry in the Register of Concentrations (hereinafter: the Register).[31]

Pursuant to Article 4 of the Bylaws the Register is kept by the registrar, who is the official authorized by the Director of the Agency.[32] Considering the obligation of the registrar to enter concentrations in the Register, and taking into account the wording of Article 23(1) of the Competition Law, which provides that the notification of the intended implementation of concentration shall be submitted to the Agency for (i) appraisal and (ii) entry in the Register, it may be presumed that concentrations are entered in the Register only after a positive decision regarding the notified concentration, that is, clearance of the concentration, has been rendered by the Agency. In other words, taking into consideration the wording of Article 23(1), one has to bear in mind that the process of notification is followed by the process of appraisal and that the final decision will be made based on the information gathered and the evaluation established. Therefore, the wording of Article 23(1) of the Competition Law stipulates that entry in the Register follows the process of appraisal.

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[30] Official Gazette No. 30/1997.

[31] The Register actually represents archives of the Agency containing relevant information on all concentrations.

[32] The internal organization of the Agency does not provide for a particular person to be registrar. Rather, the registrar should be considered a person who is primarily responsible for the whole procedure of notification, investigation and appraisal of a particular concentration.

By contrast, Article 11 of the Bylaws stipulates that the registrar enters the notification of the concentration in the Register when it is established that the notification of concentration is clear and complete. This would mean that the mere notification of the concentration should be entered in the Register. A different conclusion could be reached after reference to the Article 2 of the Bylaws which states that the Register consists of the main book, containing register files in which all the data of each individual notified concentration is entered, as well as the collection of documents containing evidence necessary for registration of (i) the notified concentrations entered in the main book of Register, (ii) other evidence submitted and collected in the registration process, and (iii) the decisions of the Agency issued after the procedure of the appraisal of concentrations. If this conclusion is correct, it would mean that both the application for notification of the concentration which is clear and complete and the concentration after the final decision has been made by the Agency are to be entered in the Register. It is questionable whether this was in fact the legislator's intention.

The practice of the Agency shows that only the cleared concentrations are entered in the Register. There is no practice that results in both the notification and the final decision of the Agency being entered in the Register. Naturally, the Agency keeps a record of all the notified concentrations. However only concentrations declared compatible with the Croatian market are entered in the Register. This approach of the Agency definitely seems to be more practical, but it is above all indispensable to make the legislative framework clear and unambiguous.

The Bylaws also provide the mandatory content of the application for the notification of concentrations. The application shall be submitted in two copies and it will contain the data provided in Article 7 of the Bylaws.[33]

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[33] The mandatory content of the application for the notification of the concentration is:

- the corporate name, the seat and the type of the activity the applicant is engaged in;
- the corporate name, the seat and the type of activity of each of the participants of the concentration;
- the name and the authority of the representative or the holder of the power of attorney submitting the application and acting as the applicant's representative;
- the name, the address, the telephone number and the facsimile number of the person the Agency shall contact, if it is not the same person having submitted the application;
- the legal form of the concentration;
- the copy of the original document certifying the legal grounds for the performed concentration;
- the annual financial report for the year preceding the concentration for each of the participants of the concentration, and a report on the business situation of each of the entrepreneurs participating in the concentration;
- the total annual turnover for each of the entrepreneurs participating in a concentration achieved through the sale of goods or services, prior to taxation; (banks provide the balance sheet, insurance companies provide the amount of the premiums written);
- a report by the management board which gives the legal and financial description of the concentration;

4.4. Notification of Extra-territorial Concentrations

An important question arises as to whether, and in which situations, concentrations implemented abroad are to be notified in Croatia. Under the Competition Law it is provided that the provisions shall apply to legal and natural persons whose registered office or residence is abroad, provided that their participation in the trade of goods and services has an effect on the domestic market.[34] Moreover, it is stated that the Competition Law shall not apply to transactions and contracts which do not affect the domestic market, and which do not have an adverse effect on the interests of other domestic entrepreneurs, in both the domestic and the international market.[35]

There are several cases in which the Agency dealt with concentrations which were created abroad and which involved foreign persons.

In the case *Imperial Chemical Industries PLC/Williams PLC*,[36] two foreign undertakings concluded a Share Purchase Agreement. Under the terms of the agreement, Williams PLC was obliged to sell the shares and make possible the sale of shares of the companies within the 'White Division' group to Imperial Chemical Industries (ICI). The companies in question were in the business of home improvement products, and together they represented the 'White Group'. Annex 8 of the Share Purchase Agreement defined the company Commenda Adria d.o.o., incorporated in Zagreb, Croatia, as one of the members of the 'White Group'. ICI requested the Agency to issue a preliminary opinion on whether in the concrete case the concentration the Agency should be notified of the concentration. The Agency

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- a list of other entrepreneurs on the relevant market in which the entrepreneurs, participating in a concentration, jointly or severally have 10 per cent or more of the voting rights or share in the equity;
- a list of entrepreneurs on the relevant market in which the members of the management board or the supervisory board of the participants to a concentration are concurrently acting as the members of the management or supervisory board;
- the number of employees of the entrepreneurs participating in the concentration;
- a report on research and development investments carried out by the entrepreneurs participating in the concentration;
- the structure of ownership after the concentration has been created in percentages, diagrams etc;
- the market share of the participants of a concentration and the market share of the entrepreneur who has acquired the controlling interest after the conclusion of concentration;
- the network of retail distribution on a relevant market and the retail distribution network of the participants in a concentration;
- a description and an explanation of the expected advantages of a concentration from the viewpoint of consumer interest.

[34] Article 2(3) of the Competition Law.
[35] Article 5(2) of the Competition Law.
[36] Case No. UP/I-030-02/97-01/18.

issued a preliminary opinion stipulating that according to the information available and pursuant to the Competition Law, notification of the concentration in question must be given. The Agency stipulated in its decision that the aggregate turnover of the undertakings taking part in the concentration satisfied the statutory thresholds for mandatory notification, that some companies, members of the 'White Group' were present on the Croatian market and that after ICI had acquired the 'White Group' its participation and position on the Croatian market had been strengthened. Hence, the Agency has held that foreign legal persons that enter the concentration, if at least one of them has a subsidiary incorporated in Croatia, are subject to mandatory notification of the concentration.

In the case *Exxon Corp., (USA)/Mobil Corp.*, (USA)[37] two companies agreed to merge. The aggregate worldwide turnover of the parties to the concentration reached the thresholds provided by the Competition Law despite the fact that the aggregate turnover on the Croatian market was below the statutory thresholds. The parties to the concentration did not have any subsidiaries incorporated in Croatia. Nevertheless, the undertakings concerned had, through direct import of their products, participated in the Croatian market. The relevant product and service market was established to be the market of the particular chemical products. The geographic market was determined as the Croatian market. The concentration was cleared. Thus, from the available facts it would seem that the Agency came to the conclusion that the undertakings concerned were required, pursuant to the Competition Law, to give notification of the concentration in question. Without prejudice, the reality was somewhat different. The Agency was actually reluctant to determine that Exxon and Mobil were obliged to give notification of the concentration. The only reason the Agency accepted to scrutinize the notified concentration under the Competition Law was that the parties to the concentration explicitly and on several occasions so requested.

The best way to prove this assertion is through reference of the notified concentration in the case *United Technologies Corp., (USA)/AB ELECTROLUX, (Sweden)*.[38] The parties to the concentration were two foreign companies. Neither of the companies had any subsidiaries incorporated in Croatia. Electrolux has been present on the domestic market through direct import of their products. The market share of Electrolux on the domestic market was around 23 per cent, and the aggregate turnover in the Croatian market relating to the sale of the Electrolux products was about EURO 100,000, while worldwide turnovers were much higher than the statutory thresholds. In the preliminary opinion issued at the request of the parties to the concentration, the Director of the Agency stipulated that as a result of the relatively small turnover realized on the Croatian market, and the relatively insignificant effect of the undertakings concerned in the trade of goods and services on the domestic market, the concentration in question would not have adverse

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[37] Case No. UP/I-030-02/99-01/93, Official Gazette No. 114/1999.
[38] Case No. UP/I-030-02/99-01/158.

effects on the interests of other domestic entrepreneurs and that therefore the parties to the concentration were not obliged to notify the intended implementation of the concentration to the Agency. It was further stated that if the parties to the concentration insisted that the concentration in question be appraised, the Agency would appraise the concentration in question and issue a formal decision.

From the cases described it would be correct to state that only partial conclusions may be made about the practice of the Agency. It appears that the Agency applies the principle that notification of the concentrations of foreign persons that have no subsidiaries incorporated in Croatia, and which are present on the domestic market only through direct import of their products, is not mandatory. Nevertheless, in light of the wording of the Agency's preliminary opinion to parties of United Technologies/Electrolux concentration, one could raise the question of mandatory notification of concentrations under similar conditions, but realizing a fairly large turnover on the Croatian market, affecting that market to a greater extent.

In any case, notification of extra-territorial concentrations is probably one of the most controversial issues in the practice of the Agency. *De lege ferenda*, with respect to mandatory notification it seems appropriate to use criteria of both the worldwide turnover of the parties to the concentration and their turnover on the Croatian market as well as their market share in Croatia. It can be argued that in such circumstances the turnover and the market share of the undertakings concerned in Croatia would be calculated on the basis of sale of their products, regardless of which person actually made the sale, that is whether the products were sold directly by the parties to the concentration, by their subsidiaries or by any other person who acquired those products through direct import from any person who is deemed to be affiliated with the parties to the concentration on the basis of shareholding.

Whatever approach regarding this issue is taken in the new Competition Law, open questions would have to be handled precisely and clearly. Only in that manner would it be possible to achieve the desired level of legal certainty.

5. Investigation and Appraisal of Concentrations

The appraisal of the concentration is an essential element in determining whether the concentration in question should be cleared or prohibited in the sense of Article 21(2) of the Competition Law.[39] Hence, pursuant to Article 24(1) of the Competition

[39] Article 26 of the Competition Law specifies an obligation on the Agency, upon the request of the Croatian Privatization Fund, to give its opinion on the possible sale of shares to a potential buyer resulting in a concentration with restrictive effects on market competition. That provision would lead to the conclusion that Agency is not empowered to evaluate the concentration implemented by a transaction following sale of shares in the process of privatization. It is precisely this that has been the position of the Agency and the Council,

Law the appraisal of the notified concentration shall be based on, *inter alia*, the following factors:

1. the need to protect and develop free market competition;
2. the structure of the markets for goods and services of all the entrepreneurs participating in the concentration;
3. the existing and potential future competitive power in the market of entrepreneurs participating in the concentration;
4. consumer interest;
5. the goals and effects of the of the intended concentration including but not limited to: (i) expending the international market, (ii) reducing the price of goods and services, (iii) shortening the distribution channels, (iv) reducing the costs of transport and distribution, as well as other costs, (v) improving the operations regarding the purchase and procurement of raw materials, (vi) specialization of production, and (vii) achieving other benefits which are directly related to the activities of the entrepreneurs participating in the concentration.[40]

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expressed in a decision rendered at the 38th session of 31 January 2000, regarding the privatization process. The Agency could theoretically just give its opinion but could not issue a formal decision either clearing the concentration or prohibiting it. In practice the Agency has never been asked to give an opinion. At any rate, the stipulation which in general excludes the involvement of the Agency in appraisal of the concentrations resulting from privatization process seems quite inappropriate.

[40] Probably the most controversial decision of the Agency regarding concentrations was rendered in the case Tvornica duhana Rovinj (TDR)/ Tvornica duhana Zagreb (TDZ) in which some of the factors mentioned above, as well as some others not expressly stipulated in the Competition Law, were applied. The case involved the concentration of the two largest Croatian tobacco factories. The legal basis of the concentration was an Agreement for acquisition of majority share-holding and acquisition by TDR of the majority of the voting rights in TDZ. The aggregate turnover of the undertakings concerned on the relevant market satisfied the statutory thresholds. The Agency stipulated the relevant product market as the market of tobacco manufacturers, and the relevant geographic market as the territory of the Republic of Croatia. The market share of the undertakings taking part in the concentration were divided such that in 1997 TDR's market share was 69.11 per cent and TDZ's market share was 30.08 per cent of the relevant market. Only 0.044 per cent of the aggregate sale of cigarettes on the Croatian market was covered by imports due to high import barriers imposed by the Government. The concentration was cleared and the most significant grounds for the decision were: (i) the failing firm defence, since all the preconditions for initiating the bankruptcy proceedings of TDR were fulfilled, (ii) the fact that the situation created by the concentration was only temporary, and that it would only last until the Republic of Croatia joined WTO since lowering of taxes and other entry barriers would bring more competition. Therefore, the Agency believed that the position of the Croatian tobacco industry should be strengthened in light of future competition, especially taking into account the negative experience of other transitional countries and the interest of consumers. Thus, the factors taken into account were of an industrial and macro-economic nature. The Agency's decision, pursuant to Article 36(2) of

Article 24(2) of the Competition Law provides that evidence related to the appraisal of the concentration shall be submitted by the entrepreneurs participating in the concentration. However, that does not limit the possibility that the Agency gathers all the relevant data by any other means. Namely, according to Article 34 of the Competition Law, the Agency is empowered to (i) require the entrepreneur to submit all the requested information, in the form, and to submit for examination all the required data and documentation; (ii) examine directly the business premises and other assets and real estate owned by the entrepreneur; and (iii) request data and information from third parties, if the Agency considers them to be in a position to contribute to the solution and clarification of specific issues related to infringement of market competition. Entrepreneurs and other persons are obliged to act in accordance with requests addressed to them by the Agency for the purpose of obtaining all information necessary for the fulfilment of the tasks of the investigation.

The Competition Law does not provide for detailed methods of analysis in the process of the investigation and appraisal of concentrations. The actual process of appraisal of concentrations, under the practice of the Agency, is much more developed and methodical than it might seem at the first sight, when concluding solely on the basis of the provisions of the Competition Law.

Nevertheless, even the practice of the Agency does not answer all the problems in the manner desired from an advanced merger control system. For example, the problem of ancillary restriction, which is not mentioned at all by the Competition Law, has not been considered by the Agency. The notion is, naturally, not unknown, but has not been thoroughly elaborated. Furthermore, the joint ventures cases have been, under the Competition Law and the practice of the Agency, exclusively dealt with under the provisions of the Competition Law applicable to the cases of cartel agreements and concerted practices. Therefore, it might be necessary to amend the present legislative framework in a way that provides a basis for an improved system to control concentrations.

5.1. Relevant Product and Service Market and Relevant Geographic Market

Item 2 of Article 24(1) of the Competition Law specifically provides that in the process of appraisal of a concentration the Council must take into account the structure of the markets for goods and services of all the entrepreneurs participating in the concentration. Nevertheless, Article 24(1), when listing the factors necessary for an appraisal, does not provide for the relevant geographic market. This is clearly

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the Competition Law, imposed a number of obligations on the parties in order to secure the functioning of free market competition on the relevant market. See case No. UP/I-030-02/98-01/42, Official Gazette No. 155/1998. See V. Soljan, '*Koncentracija Tvornice duhana Rovinj i Tvornice duhana Zagreb*', Hrvatska gospodarska revija 48 (1999) 6: 654–663.

a mistake on the part of the legislator, remedied by the practice of the Agency, which in each case of the appraisal of a concentration establishes the relevant geographic market as one of the fundamental elements in the process of evaluation of the concentration in question.

The section of the Competition Law dealing with concentration control does not specifically address the methods for determining the relevant goods and services market, or the relevant geographic market in the case of concentrations. Thus, the applicable provisions are to be found, and applied by analogy, in the section of the Competition Law concerning the abuse of a dominant position. Thus, Article 19 of the Competition Law stipulates that the market in which an entrepreneur exercises its market power shall be, *inter alia*, established on the basis of the geographic area of the entrepreneur's business operations where restrictions of free competition have taken place[41] and the kind of goods and services offered by the entrepreneur, and the availability of other goods and services in the area where the entrepreneur's market power is exercised, if the goods and services available may, by their purpose and price, be regarded as substitutes for the goods and services provided by the entrepreneur.

5.2. Notion of Dominance in the Process of Appraisal of Concentrations

The idea of concentration control is prohibiting the creation of a future dominant position or strengthening an existing one, provided that such position restrains or eliminates the competition. Thus, in the case of the concentration control one has to pay attention to the future effects of the concentration in question, especially evaluating possible future dominance.

The method for evaluation of the notion of dominance, similar to the methods for determining the relevant market, is not provided under the section of the Competition Law that deals with concentrations. The only part of the Competition Law dealing with the notion of dominance is the part related to the abuse of a dominant position by an undertaking on the market. The provisions regulating the notion of dominance are, therefore, applied by analogy to the cases of concentrations.

Article 15(2) of the Competition Law stipulates that an entrepreneur will be considered as having a dominant position on the market if, as a supplier or a buyer of certain goods or services and regarding its market power, the enterprise in question is in a superior position as compared to its competitors. Pursuant to Article 16 of the Competition Law, the enterprise shall be presumed to have a dominant position with regard to its competitors if its market share within the relevant market,

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[41] In the process of appraisal of concentrations the relevant geographic market may be determined as the market of the whole country, or as a part of that market, *i.e.*, a specific region or a specific city, etc.

exceeds 30 per cent. According to Article 18 of the Competition Law, the market power of an enterprise shall be determined by establishing the following factors:

1. the share of the enterprise in the total turnover of goods and services in the relevant market or in part of the relevant market;
2. the economic and financial position of the enterprise, and especially its financial power;
3. the development of the enterprise's distribution network and access to the sources of supply of goods and services;
4. the enterprise's connection with other enterprise;
5. the possibility of modifying and changing the offer for the enterprise's goods and services or the demand of the enterprise for other goods and services;
6. the enterprise's ability to eliminate its competitors from the market, or from the part of the market, by directing them to other enterprises or by creating barriers to market against other competitors.

The Competition Law also provides for joint, collective dominance, that is, dominance by more than one company. It is generally provided by Article 15(3) of the Competition Law that more than one entrepreneur can share a dominant position on the market. Accordingly, Article 17 of the Competition Law provides that a dominant position of more than one entrepreneur on the market exists when: (i) two entrepreneurs have a joint market share exceeding 50 per cent of the relevant market; (ii) three entrepreneurs have a joint market share exceeding 60 per cent of the relevant market; (iii) four entrepreneurs have a joint market share exceeding 75 per cent of the relevant market; or (iv) five entrepreneurs have a joint market share exceeding 80 per cent of the relevant market.

6. Decisions of the Agency

Pursuant to Article 23(2) of the Competition Law, the Agency is required to take a decision regarding a notified concentration no later than 90 days after the notification. There is no provision under the Competition Law stipulating that if the Agency does not render a decision within the period of ninety days the concentration in question is to be presumed cleared.

Article 10 of the Bylaws states that in the situation when the registrar finds out that the notification of the concentration is not clear or precise, or that it has to be corrected or completed, the registrar shall inform the applicant and issue a decision specifying the period of time within which the applicant must correct or supplement the application. If such a situation occurs the time limit of ninety days for the Agency to render a decision will begin after the complete, clear and precise notification has been submitted to the Agency.

The Agency is empowered, under the Competition Law, to issue a decision

regarding the notified concentration, clearing the concentration in question, or declaring the concentration prohibited. The Competition Law stipulates in Article 21(2) that a concentration of entrepreneurs shall be prohibited if it results in the creation of a new or strengthening of an existing monopolistic or dominant market position of an entrepreneur as a result of which competition would be significantly or on a long-term basis restrained or eliminated. Such a concentration would represent a distortion of free competition in the meaning of Article 6 item 3 of the Competition Law.[42] Clearly, concentrations *per se* are not prohibited, but rather only if two cumulative conditions are fulfilled. First, the concentration in question should create a new or strengthen an existing monopolistic or dominant position. Second, as a result of such a concentration, free competition on the market should significantly or on a long-term basis be restrained or eliminated.

It is to be stressed that Article 25 of the Competition Law provides that the temporary acquisition of shares for the purpose of resale in the course of the following 24 months, effected by a bank, another financial institution, or an insurance company, is not considered a prohibited concentration, provided that the above-mentioned institutions are registered for the operations of share trading on their own account and on behalf of other persons. Hence, although those transactions are considered concentrations within the meaning of the Competition Law, they are presumed to be allowed, since the aim of acquisition of shares is not to exercise control over another undertaking whose shares are acquired.

If it is determined that a notified concentration distorts competition, the Director of the Agency shall, pursuant to Article 36(1) of the Competition Law, issue a decision declaring the concentration in question incompatible and prohibit further implementation of the concentration.

If the notified concentration does not breach the Competition Law, the Director of the Agency shall issue a decision clearing the concentration in question. The cleared concentration shall than be entered in the Register of concentrations.

The Agency is further empowered, under the Article 35(2) of the Competition Law, to impose specific conditions to be fulfilled by the parties to the concentration within a certain period of time. This means that the Agency, when issuing a decision, may order implementation of some measures and fulfilment of some obligations as a precondition for final clearance of the particular concentration.

In cases when, in the course of investigation and appraisal of the concentration in question, it is established that the concentration that has already been implemented infringes the provisions of the Competition Law, the Director of the Agency shall in

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[42] This provision states that distortions of free market competition shall be considered to exist in the case of the prevention or restriction of entrepreneurial freedoms, or in the case of prevention or restriction of any business of entrepreneur relating to the trade of goods and services in the market such as the integration, affiliation, merger and consolidation of entrepreneurs resulting in a new, or strengthening an existing, monopolistic and dominant position.

accordance with Article 36(2) issue a decision containing: (i) the measures necessary to eliminate restrictions to competition created by the concentration in question, and (ii) the time limit for the elimination of the restrictions.

The implementation of measures and the fulfilment of obligations as a precondition for clearing the concentrations have been imposed on the parties to the concentrations by the Agency in cases *Globus grupa*[43] and *Diona*.[44] The Agency took a different attitude concerning the parties to the concentration in the previously mentioned case *Imperial Chemical Industries PLC/Williams PLC*. The Agency cleared the concentration unconditionally, but it imposed an obligation on the ICI to notify the Agency of possible further concentrations having an impact on the Croatian market, accomplished either directly or through any of ICI's subsidiaries, including Commenda Adria d.o.o. This approach by the Agency to impose an obligation of notification of prospective concentrations in the decision clearing a concentration was abandoned. The reason behind it is very logical and trivial. Namely, every future concentration satisfying the statutory thresholds must be notified in any case because of the provisions of the Competition Law. The obligation to notify a prospective concentration would be meaningful only if such future concentration did not have to be notified to the Agency pursuant to the Competition Law, that is, if such concentration did not fall under the threshold provided for obligatory notification.

One issue that should be addressed is whether the measure of divestiture, in the situation when the concentration in question has not been notified, or has been notified after the implementation of the transaction leading to concentration, is at all applicable under the Article 36(2) of the Competition Law. It seems appropriate to state that the relevant provision is wide, giving the legal basis to the Director of the Agency to issue a decision containing any kind of measures deemed necessary to eliminate restrictions to competition created by the concentration, including but not limited to divestiture.

Agency decisions regarding concentrations rendered in accordance with Articles 35 and 36 of the Competition Law shall be published in the Official Gazette of the Republic of Croatia, and in the official gazette of the Agency.[45] It is also provided

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[43] Case No. UP/I-030-02/97-01/02. The Agency imposed the following obligations on the company Globus grupa d.d.: decrease the number of its retail stores in the relevant market by one-third, either through sale, receding from the right of use, receding from the right to lease or through any other means, no later than 12 months after receipt of the decision; conclude exclusive distribution agreements for one-third of its retail stores acquired by the concentration with the condition of leaving at least 20 per cent of distribution channels for the procurement of goods from other suppliers, not later than 12 months after receipt of the decision; notify the Agency about further acquisition of any commercial premises within the relevant market, not later than 60 days before the acquisition. Globus Group d.d. was bound to deliver to the Agency a report about the actions undertaken in regard to the decision every two months starting from the receipt of the decision and until the obligations are fulfilled.

[44] Case No. UP/I-030-02/97-01/06.

[45] Article 37 of the Competition Law.

that the official decision of the Agency shall be delivered to the parties of the concentration immediately and without delay.[46]

7. Fines and Penalty Clauses

The entrepreneur who is participating in a prohibited concentration shall pay a fine of between 1 per cent and 30 per cent of the annual turnover calculated for the fiscal year preceding the year in which the violation of the Competition Law is committed.[47] For the same violation, any responsible person in the undertaking can be fined with a pecuniary fine in the amount of between HRK 40,000.00 and HRK 200,000.00.[48]

The entrepreneur that: (i) does not give notification of a concentration, as provided in Article 22 of the Competition Law, (ii) does not comply with a decision of the Agency, rendered in accordance with Articles 35 and 36 of the Competition Law, or (iii) does not comply with the requests from the Agency to submit necessary information, pursuant to Article 34(2) of the Competition Law, shall pay the fine in the amount of between HRK 500,000.00 and HRK 10 million.[49] Furthermore, for the same violation, a natural person responsible in the undertaking shall be fined with the pecuniary fine in the amount of between HRK 30,000.00 and HRK 150,000.00.[50]

8. Judicial Review

In the process of rendering a decision, the Agency, in all cases falling within the scope of the Competition Law, applies substantive rules stipulated in the Competition Law and procedural rules provided in the Law on General Administrative Procedure[51] related to the procedural issues not governed by the Competition Law.

The Competition Law provides for the possibility for parties who are not satisfied with the decision of the Agency to seek judicial protection before the Administrative court.[52] The Administrative court applies the substantive rules of the Competition

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[46] Article 14 of the Bylaws.
[47] Article 39(1) of the Competition Law.
[48] Article 39(2) of the Competition Law. Approximately between EUR 5.000 and 25.000.
[49] Article 40(1) of the Competition Law. Approximately between EUR 65.000 and 1.300.000.
[50] Article 40(2) of the Competition Law. Approximately between EUR 4.000 and 20.000.
[51] Official Gazette No. 53/1991.
[52] Article 37 of the Competition Law.

Law and other applicable laws, for example, in the case of concentrations the provisions of the Company Law will apply. The procedure is governed by rules of the Law on Administrative Disputes.[53]

In the process of enforcing the decisions of the Agency, the Agency shall *ex officio* start the Magistrate Court proceedings.[54] The Magistrate Court shall then issue a decision stipulating penalties for the parties based on the provisions of the Competition Law. The provisions of the Law on Magistrate Court Proceedings[55] govern the procedure. The right of the Agency to initiate proceedings before the Magistrate Court on the basis of violation of the Competition Law ceases 5 years after the day the violation was committed. Furthermore, penalties delivered cannot be enforced once 5 years after the final decision of the Agency has elapsed.[56]

In order to improve judicial enforcement and confirmation of the decisions made by the Agency in accordance with the Competition Law, further efforts must be made. Practice shows that in many cases the Administrative and magistrate courts delay their decisions and do not apply the law appropriately. Therefore, the issue of review and of enforcement of Agency decisions through courts is probably the weakest part of the protection of competition in Croatia. *De lege ferenda*, it would be advisable that the decisions of the Agency are in the first stage reviewed by special panels in commercial courts and on appeal by a special panel of High Commercial Court, all of which would be appropriately staffed. This would lead to the uniform application of the law, hopefully shorten the period of time for rendering judgments and thus promote legal certainty in competition issues.

9. Conclusion

The rules for the protection of competition are the basis for achieving the preconditions for free entrepreneurship and fair market competition. Thus, concentration control, by providing rules for the protection of the relevant market structure is an inevitable part of the modern legislative framework necessary in order to support development of a strong and competitive economy, diverse competition in the market and consumer protection, all of which are important factors for bringing democracy and welfare to the people.

The current Croatian legislation on concentration control should be further developed and fully harmonized with European law and practice. It is necessary to achieve a higher level of legal certainty, primarily by resolving issues defining the

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[53] Official Gazette No. 53/1991, 9/1992, and 77/1992.
[54] Article 36b of the Competition Law.
[55] Official Gazette No. 2/1973, 5/1973, 21/1974, 9/1980, 25/1984, 27/1988, 43/1989, 8/1990, 41/1990, 59/1990, 91/1992, 33/1995.
[56] Article 41a of the Competition Law.

precise moment for the notification of concentration, defining the time limit for rendering of the decision upon the effective notification of concentration, providing rules for the concentration of an undertaking which is not a separate legal entity, but part of another undertaking which constitutes a separate legal entity, regulating the questions of ancillary restrictions and joint ventures and above all improving the procedure of judicial enforcement and review of the decisions rendered by the Agency.