



REPUBLIC OF CROATIA
CROATIAN COMPETITION AGENCY

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of the Croatian Competition Agency
for 2008

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INTRODUCTION

2008 was marked by numerous activities of the Croatian Competition Agency (CCA), within its competence and available administrative capacity, which were undertaken in order to ensure a sufficiently deterrent effect on undertakings or prevent the practices of undertakings leading to prevention, restriction or distortion of competition and infringement of competition rules. The enforcement activities required expertise, determination and courage, but also flexibility of the staff responsible particularly for the area of state aid which, despite best endeavour and certain progress, is yet to take hold.

The beginning of the year 2008 brought about an increase in prices of utility services and food and rising inflation which inspired a part of the public and political environment to invite the CCA to act as a price regulator. Although the Agency decisively refused to act as a price policy regulator which is outside its scope of jurisdiction, it nevertheless, called attention to undertakings who conclude price agreements and unduly increase or cut prices leading to exclusionary abuse or practice forcing or eliminating competitors out of the market. Such behaviour is one of the most serious infringements of competition rules subject to sanctions regulated under the Competition Act.

In the same context, the example in the area of State aid left the CCA without an alternative in its assessment of the restructuring plans submitted by the shipyards in difficulty. Even though this complex matter included the further existence of the Croatian shipbuilding industry, the CCA had no choice but to issue its negative opinion on the restructuring plans which did not guarantee long term viability of the shipyards without aid in line with the criteria set under the State aid rules applicable for restructuring of the firms in difficulty. The CCA offered possible solutions and pointed out the need for a new sector reform approach.

In 2008 the CCA intensified its cooperation with aid providers with the view to establishing a new State aid regime relating to investment aid and operation in free zones, areas of special state concern and hilly and mountainous areas. Joint efforts lead to the adoption of the regional aid map in line with the commitment undertaken by the Stabilization and Association Agreement (SAA) and the criteria set in the negotiations for EU membership. This was an important step in the preparation of aid beneficiaries for the criteria under which State aid may be granted once Croatia becomes an EU Member State.

2008 was the year dedicated to the drafting of a new Competition Act. The objective of the CCA and the competent ministries was to entrust the Agency to disclose and consequently impose sanctions for the infringements of competition rules (such as practices which raise barriers to entry, market foreclosure or market partitioning, fixing prices and other terms of sale etc. to the disadvantage of the Croatian consumers).

The enforcement record relating to the Competition Act in 2008 among others indicates a number of particularly significant decisions, such as the establishment of abuse of a dominant position by *Proplin* in the gas supply market or the establishment of monopoly

practices by *Zračna luka Zagreb* in the provision of ground handling services. In the *VIPnet* case the CCA found that restrictive agreements were concluded in the mobile telephony market, whereas interim measures against *Adria Lada Hrvatska* had to be imposed in the motor vehicles distribution market. With the view to preventing possible negative effects of a concentration in the retail market, and in line with the existing rules, *Konzum* had been ordered reallocation of retail outlets in a particular territory, including the most attracting locations. All the above mentioned proceedings carried out by the CCA and respective decisions cover the markets and industries which are particularly important for the functioning of the Croatian market as a whole and at the same time, directly or indirectly, significantly affect the standard of its citizens. Non-transparent and discriminating criteria for gas supply eventually lead to higher gas prices for the consumers which were delivered gas by distributors which enjoyed more unfavourable purchase conditions than their competitors. Similarly, the monopoly of the domestic carrier in the provision of ground handling services undoubtedly lead to manifold rise in the price of air line tickets paid by end consumers – Croatian citizens and undertakings. In the core of all actions undertaken by the CCA stood the consumers' benefit, their right to better products, higher quality, wider choice and lower prices. Competition behaviour which would make sure that businesses and companies compete with each other in order to sell their products, innovate and offer a good deal is the end goal. The measures imposed in the *Konzum* case in the territory of Šibenik-Knin County only proved that the consumers are the ultimate beneficiaries of the CCA decision on the basis of which the undertaking concerned was requested to sell seven of its outlets to competitors.

In addition, in 2008 the CCA opened a couple of proceedings against undertakings or their associations where there is sufficient circumstantial evidence that they fixed prices of their services, such as in the case of driving schools or tenant property management, again to the disadvantage of the users of these services – end consumers. Further investigation into the matters is pending.

In the area of State aid, besides from the implementation of the commitments undertaken under the SAA, such as the adjustment of aid to shipbuilding, steel industry, fiscal aid in free zones, areas of special state concern, authorisation of aid schemes for employment, training, regional development etc., the CCA also opened proceedings relating to monitoring of State aid granted, such as State aid to *Rockwool* which had been granted without prior authorisation. In depth analysis has also been carried out in the case of State aid contained in the license fee paid to the public broadcaster HRT.

The priorities of the work of the Agency focus on detection and sanctioning of practices in the market which distort or eliminate competition causing harm to the consumers. In the area of State aid the CCA concentrates on allocation of the taxpayers' money towards objectives which increase competitiveness and at least affect effective competition.

The CCA continued to give opinions on the matters concerned to the ministries and thereby kept implementing a proactive competition policy relating to establishing a legal

framework on the basis of which market economy is developed, certain markets liberalized and monopolies or other barriers to entry eliminated and the role of the State in the economy altered. Globally, the CCA continued to cooperate with the national and supranational competition authorities (such as OECD and ICN) and signed cooperation agreements with the Hungarian, Austrian and Bulgarian authorities.

Finally, this Agency is determined to base its work on the law and its competences within the set legal framework. In each particular case, the decision of the Competition Council has been taken on the basis of the existing laws and rules and as such has been substantiated. One of the indicators that the Agency is on the right track, is the fact that in 2008 the Administrative Court of the Republic of Croatia in its rulings (in all four administrative disputes) confirmed the decisions of the Agency. The spotless operation of the Agency has also been confirmed in several reports of the State Audit Office.

Given the limited resources, both administrative and financial, the Agency must set the priorities of its work where effects of its work can be clearly measured. The managing body of the Agency will continue to prioritise and concentrate on potentially the most severe infringements of competition. In 2008 the Agency resolved 307 cases. In the time of crisis when it is impossible to increase the number of staff, the Agency plans to even raise its effectiveness through further training of its staff, using the IPA Programme, gaining experience in bilateral cooperation and setting up a new internal structure which will ensure even better cost benefit results which will be motivating for its employees.

Olgica Spevec, president of the Competition Council

1. COMPETITION SYSTEM IN THE REPUBLIC OF CROATIA

The Croatian Competition Agency (CCA) is the competent authority in the implementation of competition rules within the meaning of the Competition Act (OG 122/03) and the State Aid Act (OG 40/05). Rules relating to control of concentrations in the media sector are laid down under the Media Act and the Electronic Media Act. The Agency also implements the commitments undertaken by the Stabilization and Association Agreement (SAA) in Article 70 thereof.

The Competition Act sets the competition rules applicable in the Republic of Croatia, the organization of the Agency and the competences of the Competition Council and the responsibilities of the expert team of the Agency.

The Competition Act applies to all forms of prevention, restriction or distortion of competition within the territory of the Republic of Croatia or outside its territory, if such practices take effect in the territory of the Republic of Croatia, unless differently stated by specific laws for certain markets – such as the financial and banking sector where the Croatian National Bank is in charge of the implementation of competition rules in line with the Credit Institutions Act.

In line with the Competition Act the CCA is in charge of:

- assessment of restrictive agreements between undertakings,
- establishment of abuse of a dominant position, and
- assessment of compatibility of concentrations between undertakings.

The CCA issues expert opinions upon the request by the ministries and other state authorities, regarding the compliance of draft bill proposals and other legislation (as well as other related issues which may raise competition concerns), with the Competition Act.

Under the State aid Act the CCA authorises and monitors the implementation of State aid and orders the recovery of unlawfully granted state aid or aid used in contravention of the rules (less agriculture and fisheries). The Agency performs, among others, the following activities:

- assesses the State aid proposals and aid schemes;
- monitors the implementation and effects of granted State aid and orders recovery where illegally granted or used;
- collects, processes and registers data on State aid;
- collects data on use and effects of State aid;
- keeps the enforcement record and State aid inventory;
- cooperates with other competent authorities in the area of agriculture and fisheries and prepares annual reports on overall State aid;
- draws annual reports which are submitted to the Croatian Parliament, and
- co-operates with other authorities in the preparation of the State budget etc.

The provisions under the State Aid Act regulate that state aid granted without the authorization of the Agency is unlawful aid, and the Agency is authorized to order recovery of the state aid used, increased by statutory interest on arrears payable from the date on which the unlawful aid was first used. In duly justified cases the Agency can give an *ex post* authorisation of state aid if it finds that the state aid in question is compatible with the state aid rules.

In addition to the above mentioned laws, the area of competition and State aid in Croatia is regulated by a number of decisions and regulations adopted by the Government of Croatia which are enforced by the CCA. In line with the SAA, any practices contrary to the competition rules shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community.

All rules which have been adopted in Croatia in the area of competition and State aid are published in the Official Gazette and are available on the Agency's web site: www.aztn.hr On its web site the CCA publishes the most relevant rules and interpretations of Community institutions in English and/or translated in Croatian.

Provisions of the General Administrative Proceedings Act (Official Gazette 53/91 and 106/93) are applied subordinately in all proceedings carried out by the CCA.

2. ACTIVITIES OF THE CROATIAN COMPETITION AGENCY IN 2008

During 2008 the activities of the CCA were primarily concentrated on strengthening of the enforcement record both in the area of competition and State aid. The Competition Council held 25 sessions dealing with 250 items on the agenda. 330 complaints by the parties were submitted, 268 thereof in respect of competition, 62 were related to State aid.

In the past year intensive activities were carried out relating to the drafting of a new Competition Act (consequently adopted in 2009, applicable as of October 2010) which will empower the Agency to impose sanctions and thereby contribute to the establishment of a more effective competition regime in Croatia.

In 2008 the Agency also focused on:

- intensified cooperation with the competent ministries regarding the fulfilment of criteria under the benchmarks set for the opening of the negotiating chapter on competition policy (Chapter 8: Competition policy), concerning the shipbuilding sector, steel sector, fiscal aid, action plan for the adjustment of existing aid schemes and transparency of aid awards in certain sectors;
- further cooperation with the Commission in the part relating to the adjustment of existing aid schemes and enforcement record;
- further cooperation with other competent authorities and specific regulators as well as opening the cooperation with the State Commission for Supervision of Public Procurement Procedure and the Directorate for public procurement within the Ministry of the Economy, Labour and Entrepreneurship (MELE);
- exhaustive cooperation with the national competition authorities of the EU Member States, particularly from Germany, Hungary, Bulgaria, Romania, Austria, and countries in the region (Bosnia and Herzegovina, Macedonia, Slovenia, Serbia and Albania);
- promotion of competition law and policy in terms of strengthening of competition culture was carried out through a number of seminars and workshops in cooperation with the Croatian Chamber of the Economy, Croatian Association of Employers, Croatia-EU Business Council (CEUBC), the ministries, other public administration authorities and local administration. The Agency continued its proactive policy, promoting competition among all stakeholders on the rules, current practice and changes in the area of competition and State aid;
- participation in international conferences and seminars, such as the activities of the OECD Regional Centre for Competition in Budapest, despite the fact that Croatia is not an OECD member;
- facilitating cooperation between the Agency and aid providers, especially through efficient implementation of the system of notification, authorization and monitoring the implementation of State aid, through an established permanent working group, and cooperation with the Committee for monitoring of the EU State aid rules and their publication in Croatia;

- Education and training of the Agency's professional staff and aid providers at all levels, especially at the regional and local level through support by the German experts within the PHARE 2005 assistance project.

2.1 Drafting of the new Competition Act

The Competition Act in effect has been in its major part brought in compliance with the relevant EC rules, yet the deficiencies detected during its implementation since 2003 are particularly those relating to the imposition of fines (where the sanctions are not imposed by the Competition Agency but by the minor offence courts) and those aimed at the necessary introduction of so called leniency programmes. In order to strengthen the effectiveness of competition regime and ensure full compliance with the EC competition rules and practices it was necessary to revise the legal framework. These activities were particularly intensified during 2008 in cooperation with a remarkable number of institutions and experts (from the Agency, the Faculty of Law from Zagreb, MELE, the Ministry of Justice, courts and other public authorities) who participated in drafting of the new Competition Act.

In short, the most serious problem with the 2003 Competition Act in force is the fact that, under the law, the infringements of competition rules constitute minor offence falling under the jurisprudence of the minor offence courts whose territorial jurisdiction is determined by the place of establishment of the undertaking concerned. Hence, more than 100 courts and judges who rarely deal with competition concerns must decide on proper sanctions for the infringements of competition rules. This resulted in a low number of imposed sanctions, concretely speaking, in the period from 2004 to 2008 the Agency established more than 100 infringements, whereas the minor offence courts imposed sanctions in total of some HRK 1 million only, regardless of the fact that the Competition Act foresees sanctions of up to 10 % of the undertaking's turnover for severe infringements (such as conclusion of restrictive agreements, abuse of dominance and incompatible concentrations) calculated in the year preceding the infringement. Obviously, the imposed sanctions in no way correspond to the gravity of offences and the harm done to competing undertakings and consumers.

In 2008 minor offence courts took a total of 8 decisions. In 5 cases the court decided to dismiss the proceedings due to expiry of statutory limitation or ruled that there are no legal grounds for opening the proceedings in which fines may be imposed for violations of competition law. Only in 3 cases the undertakings and responsible persons thereof were imposed a total fine of HRK 456,000.

The very purpose of setting the fines for the infringements of competition rules is to impose a fine which is proportionate to the committed infringement and to ensure that they have sufficiently deterrent effect on the firm. Second, a very clear message must be sent to other undertakings as well. Third, companies involved in a long lasting infringement in a large market should be prepared to receive significantly higher fines, depending on the degree of gravity of the infringement and including the illicit profit gained through the infringement. The practice of the countries whose competition

regime is more developed proves that fines are the most important component which effectively influences the behaviour of undertakings who gain or retain their market position through infringements of competition rules. In some jurisdictions the responsible persons of the undertakings concerned even face imprisonment (USA, Canada and UK) for violations of competition law concerning the conclusion of restrictive agreements.

Therefore, in order to establish a more effective competition regime and improve the work of the Agency, the following novelties have been introduced in the new Competition Act:

- Infringements of competition rules are no more considered minor offences, they are *sui generis* violations;
- The Agency imposes fines on undertakings for the infringements of competition rules. The fine applies only to undertakings; responsible persons in undertakings are excluded.
- The new Competition Act prescribes the criteria for the imposition of fines. When setting the level of a fine duration and gravity of the infringement, aggravating and mitigating circumstances will be taken into account.
- Leniency programme or immunity from or reduction of fines for "whistle-blowers" first to come forward and inform the Agency and demonstrate evidence of prohibited agreements is introduced.
- Individual exemption of agreements between undertakings is revoked.
- In the assessment of compatibility of concentrations the dominance-based test is replaced by a new test where a merger is prohibited if it constitutes "a significant impediment to competition".
- Option of submitting a short-form notification of concentrations is introduced and a simplified procedure will be added. A list of requirements for a short-form notification is specified.
- *Ex officio* initiation of the proceedings relating to the assessment of agreements (establishing potential prohibited agreements) and in respect of the establishment of a dominant position by undertakings is introduced. Yet, natural and legal persons may submit their initiatives requesting opening of the proceedings.
- The person upon whose initiative the proceedings is initiated (complainant) does not hold the status of a party in the proceedings. Nevertheless, he/she may, in writing, communicate to the Agency any explanations of the a request, notice or a complaint, ask the Agency to communicate to him/her a short form of statement of objections and to be heard as a witness in the proceedings, he/she may submit written replies relating to the statement of objections. He/she may file a claim at the Administrative Court of the Republic of Croatia in case his/her initiative is dismissed by the Agency or if the proceedings of the Agency are closed without a decision establishing a restrictive agreement or a dominant position. In the latter case the person upon whose initiative the proceedings are initiated has the right of access to files.

- Introduction of the Statement of Objections: the Agency informs in writing the parties to the proceedings of the preliminary established facts contained in the statement of objections in order to ensure the relevant parties to express their views on all relevant facts and circumstances of the case (right of defence). The parties to the proceedings may submit their written replies relating to the statement of objections and propose that the Agency should hear other witnesses and present additional evidence.
- Wider competence is conferred to the Administrative Court of the Republic of Croatia. In respect of judicial protection it will be entrusted with both control of the legality and the merits of the Agency's decision and at the same time decide on the level of fines imposed by the Agency for infringements of competition rules.
- Rulings by the Administrative Court of the Republic of Croatia in respect of the claims against the decisions of the Agency are urgent.
- In this fast-developing branch of law, the revised EC rules have been incorporated in the national legislative framework. Bringing the EU rules regularly up to date will ensure effective competition between undertakings and resulting benefit for the consumers.

As previously stated, the new Competition Act was adopted by the Croatian Parliament on 24 June 2009, whereas it will enter into force on 1 October 2010. This long *vacatio legis* is necessary for the undertakings to prepare for the new rules of the game. In the meantime, a proactive competition policy will be promoted by the Agency which opens business community, ensures wide dissemination of knowledge, a better understanding of new rules, including their rights and liabilities under the new Competition Act.

3. ADMINISTRATION AND ENFORCEMENT OF THE COMPETITION ACT

The purpose of competition rules is to create a level playing field and clear rules of the game for all players in the market. The objective of these rules is not to protect the undertakings and their rivals but to establish a regulatory framework providing for permissible activities and behaviour for competing undertakings and enhance competition to the benefit of the consumers. Overall, fair competition generates a wider choice of interchangeable products or services, better quality and lower prices for consumers.

Expert and administrative work is carried out by the expert team of the Agency. Most of its work concentrates on assessment of agreements between undertakings, establishment of a dominant position and assessment of compatibility of concentrations between undertakings. In addition, upon the request by a ministry or other public administration authority, the Agency also issues opinions on laws and other legislation in respect of their compatibility with the provisions of Competition Act. With the view to promoting competition culture the Agency also responds to the request of undertakings and other persons and gives interpretations and expert opinions on different issues falling under its competence. In its work the Agency communicates with the Commission and other national competition authorities, prepares statistical reports etc.

In line with the Competition Act, the CCA opens the proceedings on the basis of a complaint submitted by the party or upon its own initiative. Particular attention is paid to the party's rights, through its right to access to files and right to be heard. Court protection against the decisions of the Agency is ensured through the Administrative Court of the Republic of Croatia, where the injured party may take actions.

In the enforcement proceedings the CCA is entitled to send written requests to the undertakings concerned and ask for all the necessary data to be submitted to it in writing or through oral statements. The CCA may ask for inspection of any necessary documentation, business premises, movable and immovable assets, business books, data bases etc. It may also require the necessary data from third parties which, in the opinion of the Agency, may contribute to resolving of particular competition concerns.¹

In 2008, there were 268 cases opened, 234 cases were resolved.² These numbers stand for a remarkable efficiency rate, given that the proceedings in complex competition cases may take even a couple of years.

¹ The CCA is entitled to do so under Article 48 of the Competition Act.

² Alike in previous years, the number of resolved cases in 2008 also includes the cases received in the preceding years given that the proceedings in the latter cases have been closed in this report period. In 2008, the CCA took 31 procedural orders on dismissal of the request (21 relating to abuse of dominance, 6 concerning the assessment of agreements between undertakings and 4 in the assessment of concentrations).

Table 1 Number of registered and resolved files/cases in the area of **anti-trust and merger control 2005 – 2008**

| | 2005 | 2006 | 2007 | 2008 |
|--|------|------|------|------|
| Total number of registered cases/files | 232 | 267 | 229 | 268 |
| Total number of resolved cases/files | 237 | 246 | 217 | 234 |

Source: CCA

Table 2 Total number of registered and resolved cases/files in the area of **anti-trust and merger control in 2008**

| Category of case/file | No of cases/files registered in 2008 | No of decisions/opinions/procedural orders/interim measures and others in 2008 |
|--|--------------------------------------|--|
| I ADMINISTRATIVE CASES: | | |
| 1 AGREEMENTS | 11 | 11 |
| 2 ABUSES | 36 | 24 |
| 3 MERGERS | 35 | 32 |
| Total: | 82 | 67 |
| II ADVOCACY (OPINIONS): | | |
| 1 OPINIONS ON DRAFT LEGISLATIONS | 8 | 8 |
| 2 OTHER EXPERT OPINIONS UPON REQUEST OF THE PARTIES | 5 | 5 |
| Total: | 13 | 13 |
| Subtotal ADMINISTRATIVE CASES + ADVOCACY (I+II) | 95 | 80 |
| III OTHER NON-ADMINISTRATIVE FILES | 93 | 101 |
| IV STATISTICAL REPORTS, INTERNATIONAL PROJECTS AND COOPERATION (international cooperation; cooperation with public administration authorities and other institutions) | 73 | 46 |
| V INTERNAL ACTS AND PUBLICATIONS OF THE CCA | 7 | 7 |
| TOTAL (I-V) | 268 | 234 |

Source: CCA

The breakdown of the total number of registered and resolved cases/files in the area of anti-trust and merger control in the period 2005 – 2008 using the methodology of the Commission is provided in Chapter 7 of this Report.

The efficiency of the enforcement record of the CCA should not be measured in terms of the time needed to close a certain case. However, the fact that the Administrative Court of the Republic of Croatia in 2008 issued a total of four rulings, all of them rejecting the claims filed against the decisions of the Agency, speaks in favour of credibility of the issued decisions of the CCA. In other words, all the decisions taken by the Agency which were challenged by the injured parties were upheld by the Administrative Court of the Republic of Croatia.

Table 3 Decisions of the Administrative Court concerning the actions taken against the decisions of the CCA in 2008

| CASE | CCA DECISION | RULING OF THE ADMINISTRATIVE COURT |
|--|---|------------------------------------|
| Nakladnik d.o.o. v CCA | CCA procedural order, Class: UP/I 030-02/2004-01/33 | Claim rejected |
| KOLNOA d.o.o., Zagreb and P.Z. AUTO d.o.o., Velika Gorica v CCA ³ | CCA decision, Class: UP/I 030-02/2004-01/38 | Claim rejected |
| EUROAGRAM TIS d.o.o., Zagreb v CCA ⁴ | CCA decision, Class: UP/I 030-02/2005-02/51 | Claim rejected |
| Municipality Marina v CCA ⁵ | CCA decision, Class: 030-02/98-01/181 | Claim rejected |

Source: CCA

In 2008, the Constitutional Court of the Republic of Croatia also rejected the constitutional complaint filed against the ruling of the Administrative Court of the Republic of Croatia U-III-1410/2007 and upheld the decision of the CCA.⁶

Namely, in its decision (Class: UP/I 030-02/2004-01/33) the CCA established abuse of a dominant position held by an undertaking which consequently took actions against this decision of the CCA at the Administrative Court. Given that the Administrative Court rejected the claim, the unsatisfied party filed a constitutional complaint at the Constitutional Court referring to misapplication of the substantive law. Further, the unsatisfied party argued that the CCA could not have applied the provisions of the SAA or Interim Agreement on trade and trade-related matters given that these international agreements had not been in force at the time when the claimant terminated the agreement concerned.

³ OG 86/2008

⁴ OG 47/2008

⁵ OG 141/2008

⁶ OG 25/2008

Rejecting the constitutional complaint, in its explanation the Constitutional Court stated:

"Relating to the application of the relevant law, the Constitutional Court establishes that the Agency applied the relevant substantive law applying the methods, criteria and standards of the EC comparative law in the case concerning the distribution of motor vehicles. Namely, in the absence of subordinate legislation of the Republic of Croatia which would regulate the methods, criteria and standards for the assessment of abuse of a monopoly position in the distribution of motor vehicles, the Agency applies the methods, criteria and standards of the EC comparative law covering the distribution of motor vehicles. In doing so, it provides for a uniform approach in the assessment and application of the criteria and used standards in the interest of the parties, eliminating any possibility of arbitrary assessments of the legality of the procedure. The fact that the agreement concerned had been concluded before the above international agreements entered into force, in the assessment of the Constitutional Court, does not preclude their applicability, based on the objective of these international agreements which is to eliminate all agreements or behaviour by undertakings used to restrict or distort free competition.

Hence, in the cases where anticompetitive practices are assessed, the Croatian competition authorities are empowered and committed to apply the criteria arising from the application of the competition rules applicable in the Community and interpretative instruments adopted by the Community institutions. Thus, on the basis of the SAA and the Interim Agreement the Croatian competition authorities are committed, where dealing with particular cases, apply not only the Croatian competition law but accordingly take account of the EC law."

3.1 Assessment of agreements between undertakings

The wording of Article 81 of the EC Treaty dealing with restrictive agreements between undertakings has been fully transposed into the Croatian Competition Act in force which at the same time provides for block exemption of certain categories of agreements, individual exemption and *ex lege* voidness of agreements which contravene the competition rules.

The most dangerous agreements containing hard core restrictions of competition are horizontal agreements, so called cartels, which are traditionally oral or tacit and informal agreements between direct competitors, on the basis of which they exclude competition, share markets or sources of supply, fix prices and gain profit which they would otherwise not be able to make. The Agency has drawn attention to the nature of cartel agreements on numerous occasions and explained how they directly hamper competition and harm consumers. In its annual reports (especially in the last year's annual report) to the Croatian Parliament the Agency underlined the issues relating to their disclosure, sanctioning of offenders and leniency programmes for whistleblowers who first come forward and inform the Agency of the existence of a cartel and provide

evidence can seek immunity from or reduction of fines arising from the investigation carried out by the Agency.⁷

Besides the block exemption which may be granted to certain categories of agreements the Competition Act in effect provides for a possibility (not obligation) of individual exemption of agreements upon request of a party to the agreement which cannot be exempted under the criteria of the block exemption regulation. In such cases, the CCA carries out the proceedings and assesses the particular agreement in line with the provisions of Article 81 (3) accordingly transposed into Article 10 of the current Competition Act and takes a decision on the basis of which it may grant individual exemption, decide that the agreement in question is restrictive and thereby prohibited or it may declare it conditionally compatible and impose conditions and obligations which must be fulfilled in a specified period of time for the agreement to be granted individual exemption from general prohibition. Such individual exemption is as a rule granted for five years, with a possibility of extension of that period.

However, the already mentioned new Competition Act which enters into force on 1 October 2010 abandons the possibility of individual exemption which was revoked by the EC Regulation 1/2003 which entered into force on 1 May 2004. Given that the CCA received only two requests for individual exemption since 1 October 2003 it is clear that such a mechanism is redundant and that the parties to an agreement, based on the relevant bylaws, EC guidelines and other interpretative instruments which are regularly published on the CCA website, may by themselves assess whether a particular agreement contains restrictive provisions. In other words, the CCA will no longer have to operate *ex ante* as a "solicitor" and in future will be able to redirect its resources to more complex matters of anticompetitive behaviour, particularly cartels.

In the period from 1 January 2008 to 31 December 2008 the CCA closed 11 administrative cases dealing with assessment of agreements (a part of these had been registered in previous years). However, 11 cases comprised more than 100 agreements, some of them being typical agreements which were assessed within one case (such as in the case *CCA v VIPnet d.o.o. Zagreb*, where 72 typical agreements of the latter concluded with its distributors within the territory of the Republic of Croatia were assessed in one *ex officio* proceedings).

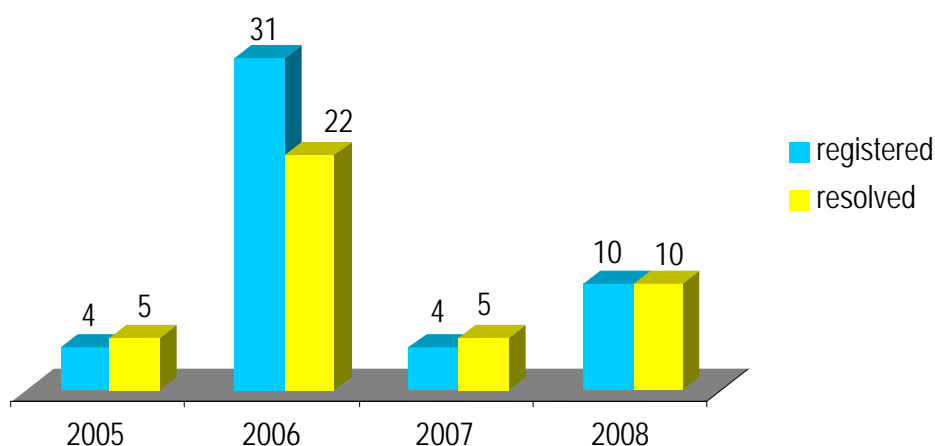
From the 11 mentioned cases one case involved the assessment of a horizontal agreement, 10 dealt with vertical agreements. The markets where these agreements had effect were the telecommunications market, the sugar manufacturing and sugar sales market, the market in distribution and servicing of motor vehicles and the medicinal distribution market.

Following the efficiency principle and in the public interest, the Agency also responded to certain cases, without carrying out a separate assessment procedure, with the view

⁷ All the above mentioned legal mechanisms (empowering the Agency to impose sanctions, carry out investigations and establish an immunity programme) have been introduced in the new Competition Act which enters into force on 1 October 2010.

to re-establishing effective competition, where, to its knowledge, certain provisions of agreements between particular undertakings contravened competition rules. In such cases the CCA indicated to undertakings concerned that certain anticompetitive provisions are contained in their agreements and that they should be modified or deleted in order to comply with competition rules, without carrying out lengthy *ex officio* proceedings. Such was the case of agreements between the undertaking *Proplin d.o.o.* and 86 other undertakings in the Republic of Croatia. The case concerned agreements on the lease of LPG containers and agreements on sale of LPG which were by their nature exclusive purchase agreements and had to be modified in line with competition rules. The undertakings modified the contested provisions in the shortest possible time period.

Picture 1 Number of registered and resolved **assessment of agreements** cases in the period 2005 – 2008



Source: CCA

Thus, in 2008, the CCA took its decision on the merit in 4 cases – prohibited agreements were established in the telecommunications market and in the medicinal distribution market. A conditional individual exemption from the prohibition was granted in the sugar distribution and sugar sales market. At the same time, one decision involved interim measures in the distribution and servicing of motor vehicles market where the CCA held the view that certain anticompetitive practices are likely to produce negative effects on undertakings in this market to the disadvantage of the consumers. In 6 cases the Agency dismissed the request of the party due to the lack of legal grounds for the initiation of the assessment proceedings.

3.1.1 CCA v Vipnet d.o.o. Zagreb⁸

On the basis of the data which the CCA collected during the preliminary market investigation, it opened ex officio proceedings involving the assessment of restrictive agreements against the undertaking VIPnet d.o.o., Zagreb – provider of telecom services who has entered into such agreements with its distributors (both wholesale and retail buyers) since 2004.

The agreements concerned ("Agreements on the sales of products and services through own distribution and other sales outlets") which VIPnet concluded with 72 undertakings – distributors of VIPnet products and services within the territory of the Republic of Croatia contained a number of restrictions. Under the agreements in question VIPnet fixed maximum rebates for the resale of contract products – VIPme and Toamato prepaid vouchers, VIPme and Tomato prepaid boxes, VIPme and Tomato packages and mobile phones. At the same time, VIPnet made the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts (concerning the detailed criteria for sales outlets, detailed marketing activities of distributors etc.).

The agreements concerned may be considered typical agreements which make a difference between "Partner" and "Big Buyer" distributors. As a rule, "Partners" have sold the contract products to end users but also provided the services for and on behalf of VIPnet (such as activation of subscribers), while "Big Buyers" have sold VIPnet products to other buyers for resale.

Given the specificity of the market and products concerned the CCA did not find the beforehand fixed sales price of the contract products for end users restrictive within the meaning of competition rules (such as the sales price of prepaid vouchers which are printed on a prepaid voucher and thereby fixed). The practice is known also in the EU Member States and in this particular case did not raise competition concerns.

Taking into account that the price for end consumers are set in the above mentioned manner, the sales price of VIPnet and its distributors (Partners and Big Buyers) and other buyers within the distribution network has been set involving the rebates for the resale of the above listed products (such as the end price for the consumers printed on the prepaid voucher). In this particular case, the rebates fixes the sales price of the product by VIPnet, its distributors (Partners and Big Buyers) and other buyers within the distribution network. By setting the maximum rebates for the resale of the contract products VIPnet actually fixed the minimum resale price for its distributors which is considered a hard core restriction of competition.

⁸ Class: UP/I 030-02/2006-01/18, decision on the establishment of a prohibited agreement of 30 December 2008, OG 41/2009 and http://www.aztn.hr/odluke_arhiva.asp

Within the meaning of competition rules, the supplier may indicate a maximum resale price or propose a recommended resale price. However, a fixed or minimum sales price as a result of the pressure or incentives by any of the contract party is explicitly prohibited under competition rules.

Given that VIPnet in this particular case fixed the minimum sales price through setting the maximum rebates, the Agency established that the agreements between VIPnet and its Partners and Big Buyers are prohibited agreements within the meaning of Article 9 par 1 point 1 of the Competition Act, which are ex lege void under Article 9 par 2 thereof.

In addition, the CCA established that VIPnet also made the conclusion of contracts with "Big Buyers" subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts within the meaning of Article 9 par 1 point 5 of the Competition Act. Those obligations on "Big Buyers" are for example detailed criteria for sales outlets (their own and their partners' who are not parties to the agreement), detailed marketing activities of its distributors etc. and are typical for selective distribution agreements which is here not the case.

In its decision the CCA declared all the above mentioned agreements containing hard core restrictions void and ordered the undertaking VIPnet to delete all provisions which as such significantly impede competition. The CCA also set the time period of three months for bringing into compliance of the said agreements with competition rules.

Although VIPnet challenged the decision of the Agency at the Administrative Court of the Republic of Croatia, it submitted the evidence proving that it acted in line with the imposed order.

Thereby, the CCA re-established effective competition in the wholesale and retail market of the telecom services provider VIPnet concerning the contract products in question. Intra-brand competition between distributors has been increased and more favourable prices for other buyers within the distribution network introduced.

In respect of hard core restrictions which represent a severe infringement of competition rules by the undertaking VIPnet from 18 February 2004 to 30 December 2008, the CCA submitted its request for the initiation of the minor offence proceedings to the competent minor offence court against the undertaking in question and the responsible person in the undertaking. The case is still pending.

3.1.2 Viro Tvornica šećera d.d., Virovitica / Pfeifer & Langen KG, Germany⁹

In line with Article 10 of the Competition Act providing for a possibility for individual exemption of agreements the CCA received from the undertaking Viro d.d., Virovitica, a request for individual exemption of the Cooperation Agreement concluded between the latter and the undertaking Pfeifer & Langen, Köln, Germany.

The task of the CCA was first to analyse the relevant sugar sales market and to take into account all possible effects on competition of the horizontal agreement in question which was submitted to the Agency for assessment without being put into effect. The parties to the agreement decided to wait for the assessment of the Agency whereas the duration of the agreement was until 31 December 2001, with a possibility of extension.

The agreement provided for a set up of a new undertaking NewCo plc, where the parties to the agreement, Viro and P&L, would have each 50 percent in the share capital. Even though it was clear that the undertakings concerned were going to create a joint venture the first step of the CCA, even before the opening of the proceedings, was to establish whether in this case the joint venture concerned is a concentrative or a cooperative joint venture.

Namely, in line with the Competition Act where Article 19 par 2 regulates a full-function joint venture (concentrative) and par 5 of the same Article a non-full function joint venture (cooperative) and the relevant EC rules used as interpretative instruments in the application of the Croatian rules, the CCA established beyond any doubt that in this particular case the undertakings concerned created a cooperative joint venture which must be assessed as an agreement between them.

The Competition Act provides that a joint venture can be concentrative, in which case articles 18, 19, 20, 21, 22, 23, 24 and 25 of the Competition Act will be applied, and the joint venture will be evaluated as a concentration. Joint venture can also be coordinative, in which case articles 9, 10, 11 and 12 of the CA will be applied and the joint venture will be assessed as an agreement.

The results of the legal and economic analysis carried out by the CCA showed positive effects of the agreement in question, such as the transfer of know-how from P&L to Viro, including the preparation of its operation in the EU once Croatia becomes a Member State and entering the sugar sales markets in the region (Slovenia, Bosnia and Herzegovina and Macedonia). Parties to the agreement will jointly enter the market in a part of the territory of Hungary, north Italy, whereas in the territory of Croatia the quality of sugar will rise, new products will be

⁹ Class: UP/I 030-02/2006-01/40, decision on individual exemption of an agreement of 14 February 2008, OG 43/2008 and http://www.aztn.hr/odluke_arhiva.asp

introduced and the joint venture concerned will enable P&L to sell new products in the Croatian market.

However, the provisions on the basis of which the parties to the agreement share markets and fix prices for the products they put into distribution are considered hard core restrictions of competition and are therefore prohibited. The CCA indicated the contested provisions and communicated to the parties that only provided that these provisions are deleted from the agreement concerned it may be granted individual exemption. Viro and P&L acted in compliance with the decision of the Agency and deleted the anticompetitive provisions from their Cooperation Agreement. CCA was submitted evidence of the changes in the form of annexes to the agreement in question.

Given that Viro and P&L acted in compliance with the request of the CCA in the prescribed time period, the individual exemption was granted to the Cooperation Agreement for a period of three years.

3.1.3 Sanabilis d.o.o., Šibenik v Citroën Hrvatska d.o.o., Zagreb¹⁰

The complaint submitted by the undertaking Sanabilis d.o.o., Šibenik concerning the alleged prevention, restriction and distortion of competition on the basis of restrictive agreements entered into between Citroën Zagreb and its authorised distributors was rejected by the Agency. The complaint involved the claims of Sanabilis regarding the special offers of Citroën in past few years which allegedly limits the rights of his authorised distributors to freely set the sales price of new motor vehicles of Citroën brand, implying that Citroën has imposed fixed prices for new motor vehicles of Citroën brand to its authorised distributors. Sanabilis was one of the authorised distributors of Citroën motor vehicles who was terminated the distribution agreement by Citroën Hrvatska d.o.o.

In the proceedings carried out by the Agency it was established that the Distribution Agreement, the Agreement on distribution of spare parts and accessories and Agreement on authorised repair and maintenance of Citroën cars, which the undertaking concerned concluded with authorised distributors and repairers do not have as their object or effect the prevention, restriction or distortion of competition and as such cannot be considered prohibited agreements under Article 9 of the Competition Act and the Regulation on block exemption granted to agreements on distribution and servicing of motor vehicles. It was also established that the referred special offers were monthly discounts a random basis which were not binding and did not cover the entire offer of Citroën cars. In special offers usually the same models were sold at discounts, nevertheless, although some versions of certain models were sold at discounts in several consequent months, special offers never included all the versions of all

¹⁰ Class: UP/I 030-02/2006-01/80, CCA decision rejecting the complaint of 17 December 2008, OG 35/2009 and http://www.aztn.hr/odluke_arhiva.asp

models. Special offers did not include fleet sales, showroom auto sales or sales of test cars, whereas only a negligent part thereof included the sales of motor vehicles which had been specially ordered from the manufacturer.

Special offers by Citroën involve minimum discounts which means that authorised dealers may offer their buyers even higher discounts. This form of special offers is not prohibited and may not be considered anticompetitive. On the other hand, it would be considered a hardcore restriction if a distributor or repairer were restricted in setting the sales price of the product (such as the restriction of the distributor's or repairer's ability to determine its sale price, without prejudice to the supplier's ability to impose a maximum sale price or to recommend a sale price, provided that this does not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties to the agreement under Article 10 par 1 point a) of the Regulation on motor vehicles). In this particular case the Agency established beyond any doubt and based on the furnished evidence by some distributors including the complaining party, that the authorised distributors of Citroën may sell the cars under special offers at different prices.

In spite of the special offers concerned, there is plenty space for intra brand competition between the authorised distributors of Citroën cars concerned. Given a negligent market share held by Citroën in the new cars sales market in the territory of the Republic of Croatia (its market share indicates a falling trend – in 2005 it was more than 7 %, in 2006 some 7 %, in 2006 some 6 %), the well-structured market with a large number of competitors, the activities of Citroën with the view to increasing its market share among the competitors – distributors of other brands – may therefore be justified in the sense of competition rules. On the other hand, despite the fact that special offers and discounts facilitate competition among distributors of different car brands and encourage inter brand competition, they bring benefit to the consumers in cutting prices of new motor vehicles.

Sanabilis challenged the decision of the CCA at the Administrative Court of the Republic of Croatia. The decision of the court is pending.

3.1.4 Interim measure – CCA v Adria Lada d.o.o., Zagreb¹¹

In the administrative proceedings opened ex officio against the undertaking ADRIA LADA d.o.o. Zagreb, an authorised importer and distributor of LADA motor vehicles in the Republic of Croatia, the CCA assessed the Sales Agreement and the Maintenance Agreement which the undertakings in question concluded with a certain number of undertakings within the territory of Croatia and took a decision imposing an interim measure. Concretely, the CCA imposed on ADRIA LADA to include the undertaking SPID d.o.o. engaged in repair, maintenance and sales, in

¹¹ Class: UP/I 030-01/2008-01/67, decision on interim measure of 17 December 2008, OG 6/2009 and http://www.aztn.hr/odluke_arhiva.asp

the authorised repairers' network of Lada cars without delay and, in addition, to include into the network in question any repairer who might request the acceptance into the network and complies with the criteria contained in the Guide for carrying out the repairs on motor vehicles of LADA brand within the warranty period, and which ADRIA LADA must make transparent, publicly available on its web site and inform the CCA thereof.

CCA also established that ADRIA LADA had applied a qualitative selective system of servicing of motor vehicles of LADA brand since 2007, under which it is eligible to choose, but in which it was supposed to accept any repairer whatsoever who fulfils qualitative criteria which it should have made publicly available. In doing so, the possibly interested undertakings, in this particular case the undertaking SPID d.o.o. Zagreb, was denied access to the market in repair and maintenance services and thereby placed at a competitive disadvantage given that ADRIA LADA did not respond to its requests for information. Taking into account the nature of the distribution network concerned, ADRIA LADA should have met the request of the interested party in line with the rules under the Regulation on motor vehicles.

Given that SPID, from early 2008 when it submitted its complaint to the CCA, to the end of the same year, did not have access to the information on the criteria it must comply with in order to become an authorised repairer of LADA brand, the CCA decided that the practice of ADRIA LADA threatened to produce significant negative effects on SPID and any other undertaking who might have wanted to join the authorised repairers' network.

ADRIA LADA challenged the CCA decision on interim measure at the Administrative Court of the Republic of Croatia. The case is pending.

In addition, after the expiry of the prescribed period for the submittal of evidence on compliance with the imposed interim measure, CCA submitted the request for the initiation of minor offence proceedings against the undertaking ADRIA LADA and the responsible person of the undertaking to the competent minor offence court. The case at the minor offence court is also pending.

3.1.5 Proplin d.o.o., Zagreb and 86 other undertakings – agreements on rental of small propane storage tanks and agreements on sale of LPG in small containers

To address the identified competition concerns in this particular case the CCA carried out a preliminary assessment without opening a formal procedure concerning the establishment of a restrictive agreement.

To the CCA knowledge, the undertaking Proplin d.o.o., Zagreb had been concluding typical agreements on the rental of propane storage tanks and typical

agreements on the sales of LPG in small containers with a large number of undertakings and natural persons in the territory of the Republic of Croatia, whereas the duration of these agreements by far extended the terms set under the competition rules.

Within its competences, the CCA carried out a preliminary assessment of the relevant market and asked Proplin to provide its commitments concerning the necessary modifications of both types of the above mentioned agreements. The request of the CCA referred also to the duration provisions, where the duration of the agreements on rental and agreements on the sale of LPG in small containers should be limited to five years, whereas the duration concerning the agreements on the sale of LPG for buyers who are owners of small containers should not exceed one year, these being the normal durations for such agreements in line with the EC practice.

Namely, the agreements which by nature are exclusive purchase agreements had been concluded on a long term (ten years) by Proplin, one of the biggest undertakings engaged in LPG trade, who holds a dominant position in the market concerned, are not in compliance with competition rules, given that such agreements may lead to foreclosure and raising barriers to possible new entrants. It is unlikely for new suppliers to enter the market where buyers are contract bound for such a long period of time. Therefore, the agreements of shorter duration definitely are in the interest of the users/buyers of Proplin who after the expiry thereof may decide if they want to continue cooperation with Proplin or sign a new agreement with a different supplier.

Finally, the CCA asked Proplin to amend the existing agreements unless it wishes to be subject to formal ex officio proceedings which in that case would be opened by the CCA and in which 86 restrictive agreements entered into between the undertaking concerned and 86 different undertakings would be assessed within the meaning of the Competition Act in part referring to prohibited agreements (Article 9). In addition, unless Proplin offers adequate commitments, the CCA would also open ex officio proceedings for the establishment of a dominant position against Proplin concerning the conclusion of 3,772 agreements with natural persons in line with Article 16 of the Competition Act.

Proplin fully complied with the preliminary assessment of the CCA. In the time period shorter than six months, it concluded new agreements with its buyers (legal and natural persons), the duration of which is, in line with competition rules, five and one year respectively.

3.2 Abuse of a dominant position

Competition Act under Article 16 prohibits any abuse of a dominant position by one or more undertaking in the relevant market. The text of this Article is fully harmonized with Article 82 of the EC Treaty.

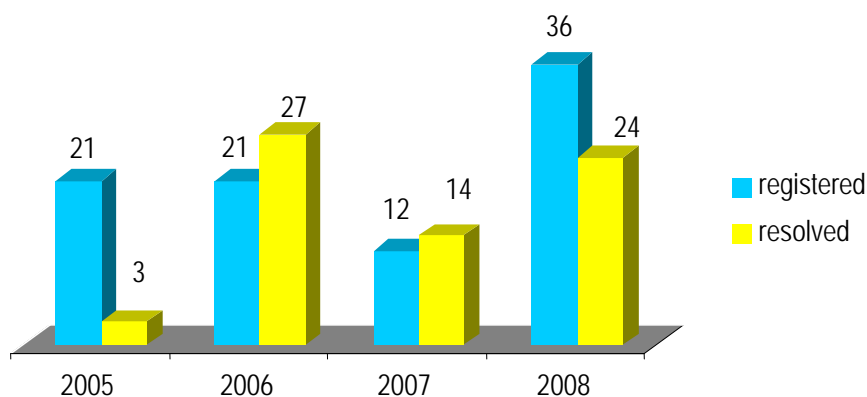
The key prerequisite of abuse of a dominant position is the fact that the undertaking concerned actually holds a dominant position in the market. After the CCA receives a request from a party to initiate a proceeding relating to the establishment of abuse of a dominant position or before it opens a proceeding on its own initiative, it carries out preliminary assessments and market analysis in every particular case. In line with the Competition Act, the Agency must first define the relevant market, identify the undertakings active in this market and establish their market shares. However, a market share is only one of the criteria on the basis of which a dominant position may be presumed. With the view to establishing a dominant position beyond any doubt, the CCA also applies other criteria, such as the financial power of the undertaking concerned, its access to sources of supply or to the market, ownership ties, legal and factual barriers to entry, the power of the undertaking to dictate the market or to exclude its competitors from the market. In addition, collective dominance should also be taken into account.

As a rule, when the Agency establishes a dominant position by an undertaking, by means of a procedural order it may open a proceeding involving the assessment of possible abuse of this dominant position. The CCA carries out the analysis of the relevant market, its openness and dynamics, number of competing undertakings and the rising or falling trends in their market shares, high barriers to entry or exit (such as sunk costs etc.). Furthermore, the Agency carries out a detailed economic analysis, establishes economic effects or possible effects of the behaviour of the undertaking where alleged abuse of dominance is indicated. In its economic based approach the CCA applies the relevant EC rules, such as the Guidance on Commission enforcement priorities in applying Article 82 to exclusionary conduct by dominant firms (OJ C 45, 24.02.2009).

In the report period the CCA opened a total of 36 cases establishing abuse of a dominant position either upon the request of a party or on its own initiative. The proceeding was closed in 24 cases, including some of the proceedings which were opened in the preceding report periods. The CCA took 3 decisions; in 2 thereof it established abuse of a dominant position, whereas in one case the request of the party concerning the alleged abuse was rejected. Abuses were established in the gas distribution market, provision of ground handling services (unload/load of catering supplies), whereas no abuse was found in the compulsory motor insurance and comprehensive insurance market.

21 requests were dismissed by means of a procedural order given that there was no legal ground for the initiation of the proceedings (firms were in no dominant position) or based on the lack of jurisdiction.

Picture 2 Number of registered and resolved abuse of a dominant position cases
2005 – 2008



Source: CCA

In its decision on established abuse of a dominant position the Agency prohibits the abuse, sets the conditions and imposes measures with the view to eliminating abusive practices and sets other terms with the aim to ensure that dominant undertakings do not impair effective competition in a particular market.

3.2.1 Sedam-plin d.o.o., Virovitica and Brala trade d.o.o., Islam Latinski v Proplin d.o.o., Zagreb¹²

The procedure for the establishment of alleged abuse of a dominant position was initiated on the basis of a complaint submitted by the undertakings Sedam-plin d.o.o. and Brala trade d.o.o. stating that the undertaking Proplin d.o.o. cut their LPG supplies with no justifiable reason and refused to grant them the rebates in line with the common rebate policy applicable to other LPG buyers.

The analysis carried out by the CCA established that the undertaking Proplin, a member of INA d.d. group had until 27 August 2007 been the sole economic operator in the territory of the Republic of Croatia who had direct access to the sole domestic LPG factory – the undertaking INA d.d., who on its part, sold all its LPG supplies covering the sales in the territory of the Republic of Croatia exclusively to Proplin. Given a low volume share of the imported LPG in the relevant market Proplin held a high market share of more than 90 per cent in the relevant market. On 27 August INA took the decision on the basis of which Proplin acquired the LPG wholesale business. Given the vertical integration between the undertakings concerned (INA holds 100 % share of Proplin), this

¹² Class: UP/I 030-02/2006-01/41, decision on abuse of a dominant position of 30 December 2008, OG 62/2009 and http://www.aztn.hr/odluke_arhiva.asp

decision had no influence on the structure of the relevant market. LPG could be purchased from other distributors, however these distributors exclusively bought LPG from Proplin/INA. In the whole time period of abuse it was the LPG, directly or indirectly, purchased from INA.

In LPG supply market covering the territory of the Republic of Croatia, the Agency established that the undertaking Proplin d.o.o.: (1) abused its dominant position starting 1 October 2003 until 30 December 2008, first, by applying dissimilar and non-transparent conditions relating to its rebate policy towards its buyer and, (2) abused its dominant position in the period from 8 May 2006 to 31 December 2006 by imposing the unfair trading conditions in the sales of LPG in gas cylinders and tanks, binding the buyers to exclusively purchase LPG from the undertaking Proplin d.o.o., in other words by making the conclusion and duration of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

In accordance with the findings of the CCA, the non-transparent rebate policy was also incompatibly applied. Rebates were granted on the basis of a Decision on the rebate policy taken by Proplin, an internal bylaw which stated the LPG volumes, categories of buyers and rebate rates which were not available to all buyers.

Beyond any doubt it has been established that rebates were granted to particular buyers regardless of the actual volumes sold in a one year period to the buyers concerned, which indisputably indicates the absence of a non-discriminating volume rebates which would be adequately applicable to all buyers. In addition, the Decisions on rebates in effect from 1 October 2003 to 30 December 2008 contained a provision (Article 4 thereof) on the basis of which the director of Proplin could unilaterally grant special rebates to certain buyers regardless of the volumes of LPG bought by the latter preventing the existing buyers to turn to competition (these buyers were named "strategic buyers"). Article 4 of the Decision was amended as of 1 June 2007 whereby a part of the provision relating to the special rebates granted to the customers to prevent them from turning to other suppliers was deleted.

Proplin did not specify the criteria for granting rebates ("strategic buyers" definition, volumes). Moreover, rebates in the form of incentives the buyer faces not to switch to other suppliers and preventing him to freely choose a trading partner constitutes a hard core restriction of competition. In implementing its rebate policy Proplin may grant volume rebates or discounts to its buyers. However, given its dominant market position – high market share, market power and access to supply, these rebates and discounts must be transparent and available to all customers in the market.

Furthermore, abuse of a dominant position of the undertaking concerned involved also supplementary obligations imposed on the trading parties entailed in the LPG sales contracts (both in gas cylinders and tanks). It is particularly prohibited within the competition rules for a party holding a dominant position to conclude contracts which have the elements of exclusive agreements under which rewards in the form of rebates is offered for this exclusivity.

For all the above mentioned reasons, the CCA ordered the undertaking Proplin to delete the anticompetitive provisions on rebate policy contained in the internal acts and other contracts and prohibited any further activities of the undertaking in question which may prevent, restrict or distort competition through abuse of a dominant position of the party as described in the decision of the CCA.

Finally, the CCA rejected the part of the complaint of the parties relating to the alleged cuts in LPG supply. It was established in the proceedings that Proplin did not reduce the LPG supply under the contract entered into between the parties concerned.

Although Proplin took action against the decision of the Agency at the Administrative Court of the Republic of Croatia it at the same time complied with the decision of the Agency within the prescribed period. It submitted to the Agency a new Decision on rebate policy which no more contravenes with competition rules. In line with its competence, the Agency submitted to the Minor Offence Court in Zagreb its request for the initiation of the minor offence proceedings against the undertaking Proplin and the responsible person of the undertaking based on the established abuse of a dominant position. The case is still pending.

3.2.2 Croatia Airlines d.d., Zagreb v Zračna luka Zagreb d.o.o. and Zračna luka Zagreb – Ugostiteljstvo d.o.o.¹³

The Croatian Competition Agency rendered its decision in the case Croatia Airlines d.d. v Zračna luka Zagreb d.o.o. and Zračna luka Zagreb – Ugostiteljstvo d.o.o. establishing that Zračna luka Zagreb (Zagreb Airport Ltd.) and its subsidiary Zračna luka Zagreb – Ugostiteljstvo (Zagreb Airport Catering Ltd.) have been abusing their dominant position in the relevant market in transport, unload/load of catering supplies (food and drink) from/on aircrafts in the area of Zagreb Pleso Airport.

Taking into account that the undertaking Zagreb Airport exercises control over the undertaking Zagreb Airport Catering, these two are considered one undertaking within the meaning of competition rules. The former is together with

¹³ Class: UP/I 030-02/2007-01/15, decision on abuse of dominance of 30 December 2008, OG 66/2009 and http://www.aztn.hr/odluke_arhiva.asp

its controlled company a sole operator and handling agent providing all ground handling services in Zagreb Pleso Airport. In the market in aircraft ground handling – transport, unload/load of catering supplies (food and drink) from/on aircrafts there are no operators who would be competing undertakings of the undertakings concerned, hence, it may be presumed that they hold a dominant position in this particular market.

In the sense of the decision of the Agency the connected undertakings concerned have abused their dominant position in two ways.

First, in the period from 1 March 2007 to 25 May 2007 the abuse of dominance had been established in the sense of the suspension of the provision of service including transport, unload/load of catering supplies (food and drink) from/on aircrafts to the undertaking Croatia Airlines by the above mentioned connected undertakings, whereas any further provision of the service concerned had been made subject to acceptance of supplementary obligations by Zagreb Airport Catering.

Second, since 1 September 2007 onwards abuse of a dominant position has been established on the basis of application of unfair prices charged for the provision of transport, unload/load of catering supplies (food and drink) from/on aircrafts in the area of Zagreb Pleso Airport – using the language of competition rules – through application of dissimilar conditions to equivalent transactions which are not objectively justified and cost related.

In addition, the above mentioned abuses must be examined in the time context. Before the undertaking Zagreb Airport increased the charges for the provision of the service of transport, unload/load of catering supplies (food and drink) from/on aircrafts to all carriers in September 2007, it refused, as early as in March 2007, to provide the service to Croatia Airlines through its controlled undertaking – Zagreb Airport Catering. It is indicative that Zagreb Airport decided to terminate the provision of the service concerned at the moment when Croatia Airlines, as the biggest service user, decided to cancel the business cooperation with Zagreb Airport Catering and switched to another supplier of in-flight meals (sandwiches). Zagreb Airport re-established the service concerned only after it had been ordered to do so in line with the written authorisation of the Ministry of the Sea, Tourism, Transport and Development. After Zagreb Airport Catering had been explicitly ordered to continue with the provision of all services agreed with Croatia Airlines, the former introduced a new price list of charges for transport, unload/load of catering supplies (food and drink) from/on aircrafts, which was notably the first change in prices since 1999. The charges in the new price list applicable as of 1 September 2007 are some 300 per cent higher than the same charges under the previous price list. Furthermore, the new price list introduced two sets of charges for the same service – so called handling 1 and handling 2, where the price for the provision of the service of transport, unload/load of catering supplies (food and drink) from/on aircrafts depends on the storage

locations. In other words, different charges are applicable for the ground handling service depending on whether it is provided by Zagreb Airport from the storage location of its own or from the storage location of the air carrier. At the same time, Croatia Airlines, holding the status of a dominant buyer of the service provided by Zagreb Airport, has been offered an exceptionally high discount which cannot be enjoyed by other users of Zagreb Airport services.

On the basis of the relevant facts arising from the behaviour of the undertaking Zagreb Airport in the market concerned and economic analyses carried out by the Competition Agency, the conclusion is that the undertaking in question, after the appearance of competing undertakings in only one segment of its business activities, reacted by termination of the provision of the service of transport, unload/load of catering supplies (food and drink) from/on aircrafts to Croatia Airlines, at the very moment when the latter switched to another supplier of in-flight meals (sandwiches). When, in line with the order issued by the competent ministry, Zagreb Airport was obligated to continue with the provision of the service concerned, it significantly raised the charges for the service of transport, unload/load of catering supplies (food and drink) from/on aircrafts and offered a remarkable discount to only one, its dominant buyer, without a possibility of such discounts for other buyers.

The analyses of the structure of costs which are decisive for establishing the price of the service in the business segment concerned and the results of the macroeconomic analyses in respect of the period concerned indicate that Zagreb Airport has unfairly abused its dominant position in the relevant market without competition. What is more, the market structure benefits the Zagreb Airport to the extent which would not be possible if there was effective competition in the market concerned.

On the basis of the above mentioned data the Competition Agency has undoubtedly established that Airport Zagreb has abused its dominant position by charging unfair prices.

In this particular case it must also be noted that Zagreb Airport is for the air carrier Croatia Airlines and for no other carrier a "port of call". Consequently, the majority of services including the service of transport, unload/load of catering supplies (food and drink) from/on aircrafts are logically provided by Zagreb Airport and Zagreb Airport Catering as necessary business partners.

In addition, the Agency established that the price difference in respect of handling 1 and handling 2 services is not justified by the transport costs and other variable costs based on the difference in distance between the storage location of Zagreb Airport Catering and other storage locations in the area of Zagreb Pleso Airport. Thus, given that the difference in costs cannot be objectively justified, the transactions in question are considered the same whereas the different charges for handling 1 and handling 2 discriminatory, which

constitutes abuse of a dominant position by the undertakings Zagreb Airport and Zagreb Airport Catering.

Hence, the unfair and discriminatory prices and the consequent abuse of a dominant position contributed to the decision of the Agency in which it issued an order directed to the undertaking Zagreb Airport Catering to modify and adopt a new price list for the service of transport, unload/load of catering supplies (food and drink) from/on aircrafts without delay, within the period of three months at the latest. The new price list must be based on prices which are established in a clear, transparent and non-discriminatory manner and must reflect the actual costs of the undertaking concerned incurred through the provision of the service in question, regardless of the position of the storage location in the area of Zagreb Pleso Airport.

Finally, in the part of its decision the Agency rejected the request of the undertaking Croatia Airlines relating to the alleged abuse of a dominant position of the undertakings Zagreb Airport and Zagreb Airport Catering through the imposition of unfair prices of meals in line with the price list applicable since 5 June 2008. The part of the request has been rejected due to the lack of legal basis where the catering service (production of meals) is not connected with the service of transport, unload/load of catering supplies (food and drink) from/on aircrafts. Concretely, the access to the provision of catering services (production of meals) market is open, which enables Croatia Airlines to turn to and select from any catering suppliers, also competing undertakings of Zagreb Airport Catering, the practice which Croatia Airlines already pursues in the supply of in-flight meals (sandwiches).

The undertakings Zagreb Airport and Zagreb Airport Catering filed separate claims against the decision of the CCA at the Administrative Court of the Republic of Croatia. The cases are pending.

However, the undertakings in question started to comply with the decision of the CCA. They submitted the drafts of new price lists for the provision of ground handling services concerned. Handling 1 and handling 2 services have been deleted and a uniform price has been introduced as of 22 May 2009. Yet, these new prices are still some 300 per cent higher than the prices which were valid until 31 August 2007. Given that in the opinion of the CCA the new price lists must be further revised as to comply with the real costs of the service providers it rejected to agree with the commitment of the undertakings concerned and asked them to amend them accordingly.

The Agency also contacted the competent ministry and asked for its cooperation in addressing the issue of regulation and possible monitoring of the prices in the provision of the ground handling services in Pleso Airport where for the time being this activity has been carried out by only one undertaking holding monopoly position in this relevant market.

Given that the practices of the undertakings concerned constitute hard core restrictions of competition the CCA submitted to the competent minor offence court a request for the initiation of the proceedings against the undertakings which abused their dominant position in the manner described above but also which continued to abuse their dominant position and did not change their behaviour in accordance with the request made by the CCA. The case at the competent minor offence court is pending.

3.2.3 Motor Vehicle Repairer Workshops Section of the Trades and Crafts Chamber of the Split-Dalmatia County, Split v Euroherc osiguranje d.d., Zagreb and Jadransko osiguranje d.d., Zagreb¹⁴

The Agency rejected the request of the Motor Vehicle Repairer Workshops Section of the Trades and Crafts Chamber of the Split-Dalmatia County, Split concerning the alleged abuse of a dominant position by the insurance companies Euroherc osiguranje d.d., Zagreb and Jadransko osiguranje d.d., Zagreb in the compulsory third party insurance market and comprehensive automobile insurance market. The request was rejected due to lack of legal grounds concerning the complaint of the Repairers Workshops against the insurance companies in question who are connected undertakings of Agram group. The complaint referred to alleged exclusionary practices of the insurance companies against the repairers who did not conclude agreements with the former, pressure on repairers to conclude such agreements and intimidation of policy holders to carry out the repairs after the damage in particular repairer workshops.

After the legal and economic analysis the CCA established that Agram group holds a dominant position in both relevant markets – compulsory and comprehensive insurance in the territory of Split-Dalmatia County in 2005, 2006 and 2007. A significant market share held by Agram group is also indicated in the neighbouring markets covering the claims settlement procedures relating to both compulsory and comprehensive car insurance in the same territory during the same period (in 2005 and 2006 Agram group held a dominant position in both markets). The CCA also established that the motor vehicle repairers market which is connected to claim settlements in the referred territory indicates a low degree of concentration and thus more competition. Hence, the market power a particular insurer undertaking in the insurance market spills over to the repairers' market connected with damage, given a higher number of policy holders and increased number of repairs due to damage.

Euroherc concluded cooperation agreements with only 5 repairers in the territory of Split-Dalmatia County, out of 199 who it did business with in 2005 or out of 184

¹⁴ Class: UP-I/ 030-02/2006-01/20, decision on rejection of the request of 30 December 2008, OG 78/2009 and <http://www.aztn.hr/slike/Servisne%20radionice.pdf>

in 2006. Nevertheless, five repairers in question hold only a negligible share, less than 5 % of the payments made for damage repairs in the total amount of compensation under the claims for damages by the undertaking Euroherc to all repairers which it did business with in 2005 and 2006.

Jadransko osiguranje concluded no cooperation agreements in the same territory during the same periods. It did business with the similar number of repairers as Euroherc osiguranje in 2005 and 2006. Two repairers – Euro Daus d.d. and Euro Daus 1963 d.d. are members of Agram group. The former held a share of 10 -20 % in the amount of payments made by Euroherc to repairers in 2005, with a falling trend in 2006. The latter started its cooperation with Euroherc osiguranje only in 2006 with a share of some 0 – 10 %. In 2005 Euro Daus held a share of 10 – 20 % in the total payments made for damage repairs by Jadransko osiguranje, whereas in 2006 this share was 10 – 20 %.

In line with the above findings the CCA decided that there was no evidence that the repairers were put under pressure by the members of Agram group. The number of concluded agreements was negligible with a falling trend. The repairers who entered into such agreements did not make more significant revenues on the basis of payments under claim settlement compared with the repairers who did not conclude agreements with insurance companies. The affiliated undertakings within Agram group – Euro Daus and Euro Daus 1963 did not have a significant share in the total payments made to repairers under the claims for damages by the undertakings Euroherc and Jadransko osiguranje in the reported period. Thus, the matter concerned did not involve application of dissimilar conditions to equivalent transactions with other trading parties or supplementary obligations under the contracts which by their nature or according to commercial usage have no connection with the subject of such contracts.

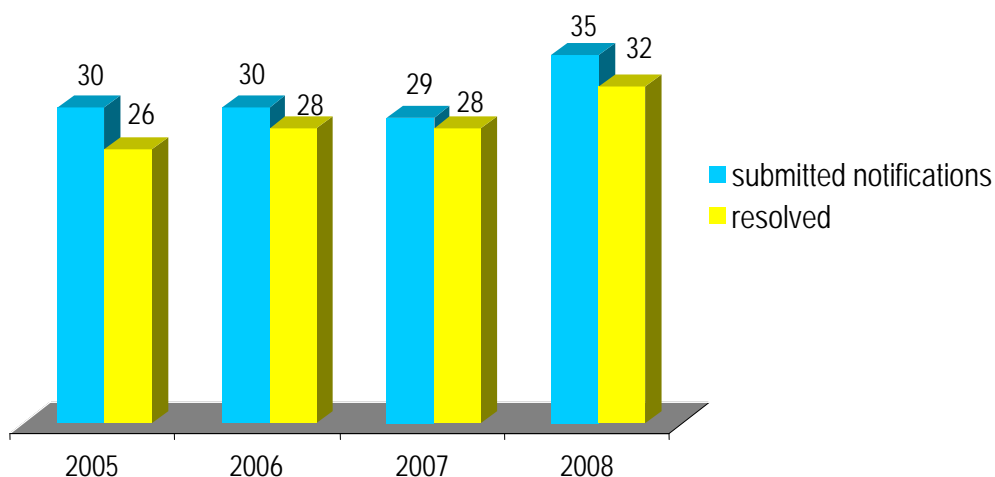
It must be noted that the case included a comprehensive investigation by the CCA, loads of data and witnesses' statements during three oral hearings. The findings indicated that there was no significant influence exerted on the policy holders regarding their choice of repair shops. The CCA consequently decided that abuse of a dominant position by the undertakings concerned in the relevant market in question could not be established in line with its investigation and oral and written evidence furnished by the parties and the witnesses to the case. Thus, the business practices concerned did not constitute abuse of a dominant position in the form of directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions (as to the work norms and hourly rates of repairers). What is more, the submitted evidence proved that the insurance companies in general covered for the costs claimed by the repair shops, whereas where these costs underwent corrections the balance was not significant enough as to indicate behaviour which would distort competition in the motor vehicle repair sector concerning the payments in terms of compensations for damages made by insurance companies.

3.3 Assessment of compatibility of concentrations between undertakings

In 2008 the CCA received a total of 35 notifications of a concentration and closed 32 cases relating to the assessment of concentrations between undertakings. This is 20 % more than in the period from 2005 to 2007. A strong global trend towards flow consolidation through concentration between undertakings in all markets also in Croatia has been additionally speeded up by the global crisis.

In 28 cases the CCA assessed the notified concentrations in the first or second phase, whereas in 4 cases it dismissed the request of the notifying party. The procedural orders on dismissal in two cases relied on the fact that in these two cases a concentration of undertakings did not arise within the meaning of acquisition of control or decisive interest in line with the Competition Act. In one case it could be concluded without any doubt that no ownership change occurred in the electronic media publisher, the concession in this particular case was merely transferred from one undertaking to another. Two procedural orders were taken on the basis of the fact that cumulative criteria relating to turnover thresholds of the undertakings concerned were not met.

Picture 3 Number of submitted **notifications** and resolved **merger cases**
2005 – 2008



Source: CCA

One of the concentrations was assessed as conditionally compatible whereby the CCA imposed conditions and obligations to remedy the possible significant anticompetitive effects on effective competition in the relevant markets concerned. The remedies concerned involved structural and behavioural measures.

On concentrations between undertakings

A concentration shall be deemed to arise where a change of control on a lasting basis results from: the merger of two or more previously independent undertakings, or the acquisition, of direct or indirect control of the whole or parts of one or more other undertakings.

All undertakings exerting joint control under competition law are considered one undertaking. All companies of a group thus constitute one undertaking.

Concentration between undertakings arises through merger or acquisition of two or more previously independent undertakings whereby all undertakings may proceed with their operation under the name of one of the undertakings concerned or they may set up a new company under a new name. Concentration through acquisition of control arises where one or more undertakings acquire prevailing interest through acquisition of the majority of shares or share capital, or- obtaining the majority of voting rights, in one or more previously independent undertakings.

Concentration between undertakings may arise on the basis of a decisive influence in line with the Companies Law, which may be achieved by holding rights, contracts or by other means, through which one or more undertakings, either solely or jointly, within specific legal and factual circumstances, is enabled to exercise prevailing influence on one or more other undertakings. Thus, one undertaking may exert a decisive influence over another undertaking without acquisition of shares or voting rights in the undertaking concerned (such as in the case of entrepreneurial contracts defining the terms of managing business).

Concentration between undertakings represents a perfectly legitimate, sometimes the only possible, model of agglomeration of undertakings. Synergy effects are necessary for the increasing power and for realizing of economic goals which cannot be achieved by other means (such as the economy of scope or economy of scale). Hence, the implementation of a concentration may be even desirable from the point of view of competition rules.

Parties to the concentration must notify the proposed concentration to the Agency. However, subject to notification obligation are only concentrations which satisfy the cumulative criteria including the combined aggregate turnover where (i) the total turnover of all the undertakings – parties to the concentration in the global market amounts to at least 1 billion Kuna in the financial year preceding the concentration, and (ii) the total turnover of each of at least two parties to the concentration realized in the domestic market, amounts to at least 100,000,000 Kuna in the financial year preceding the concentration. The irrebuttable presumption contained in the prescribed thresholds implies that parties to the concentration which doesn't have the necessary economic and market power cannot significantly impede competition. The thresholds vary from jurisdiction to jurisdiction given that they constitute the competition policy of a country.

The Agency carries out assessments of compatibility of concentrations taking into account its actual or possible negative effects on competition and

consumers interest. If simply put, the Agency appraises in every particular case if competition remains undistorted or even has positive effects after the implementation of a concentration concerned.

Arbitrary assessment is excluded. The Agency applies a number of prescribed economic criteria, carries out comprehensive legal and economic analysis on the basis of which it takes its decision in a concrete case of a compatible, incompatible or conditionally compatible concentration.

Prohibited concentrations are rare.¹⁵ On the basis of the criteria which are set forth by law and transparent the undertakings themselves can appraise if the proposed concentration will raise competition concerns. If they are not sure, in line with the standards of good practice, they may unofficially consult the Agency. Prohibited concentrations are thus the result of an error of judgement, failure to unofficially contact the Agency or disregarding the opinion of the Agency in the matter concerned.

In the case where a concentration is declared conditionally compatible the Agency imposes remedies (conditions, obligations and time periods for their fulfilment) which it considers most effective with the objective of eliminating competition concerns which are the result of the implementation of the concentration concerned. These remedies traditionally consist of divestiture obligations and behavioural measures. However, they in no way constitute sanctions. Their purpose is maintenance of effective competition.

In this report period the activities of the CCA in this area have been particularly concentrated on two relevant markets: the media market and in the food retail market in non-specialised stores.

3.3.1 Media mergers

In 2008 the Agency received a total of 19 notifications by undertakings in the media market. Two concentrations thereof were assessed in line with the Media Act (OG 59/04) whereas 13 concentrations appraisals were carried out under the Electronic Media Act (OG 122/03, 79/07 and 32/08). More than a half of the total number of concentrations thus covered the media market.

The Competition Act elaborates Articles 49 and 50 of the Constitution of the Republic of Croatia on entrepreneurial freedom. The very purpose of the Competition Act is to create the level playing field for all undertakings and create benefit for consumers in the form of lower prices, wider choice and better quality.

On the other hand, the Media Act and the Electronic Media Act rely on Article 38 of the Croatian Constitution on protection of media pluralism and diversity. The media

¹⁵ The European Commission assessed compatibility of 3634 concentrations in the period from 1989 – 2007. Only 20 concentrations thereof have been declared incompatible and prohibited, which is less than 0.5 % of the total. For example, the Slovenian competition authority since its establishment in 1994 found no concentration prohibited.

provisions explicitly state that competition rules apply to media publishers and distributors, thereby also to concentrations between undertakings in the media sector. However, based on the above mentioned legislative framework, the question arises whether the entrepreneurial approach is reconcilable with protection of media pluralism and diversity.

In other words, the main problems of the CCA in the assessment of concentration between undertakings in the media sector are as follows:

1. the provision under the Media Act on obligatory notification and assessment of compatibility of all concentrations between undertakings in the media market, regardless of their economic power and turnover thresholds criteria;
2. the provision under the Electronic Media Act on obligatory notification of any change in ownership structure of electronic media;
3. criminal provisions under the Media Act and the Electronic Media Act providing for sanctions for "impermissible concentrations".

The Media Act explicitly excludes the provision under the Competition Act which, as earlier described in this text, sets certain turnover thresholds subject to obligatory notification of a proposed concentration to the Agency. What is more, the Electronic Media Act provides for a notification obligation for any "ownership" change if the undertaking operates in the electronic media sector. This provision contravenes the fundamental provisions of the competition legal framework based on couple of reasons.

First, if a transfer of shares or a change in the share holding capital does not lead to changes in control, within the meaning of competition rules, concentration does not arise. The submittal to the CCA of notification of such changes makes no sense. It may serve as a kind of record or register which taking into account the competences of the Agency cannot be the basis for possible interventions in this area, given that they fall under the jurisdiction of specific regulators.

Second, although the Media Act and the Electronic Media Act generally provide that general competition rules apply in the appraisal of concentrations between undertakings, they nevertheless designate sanctions for "impermissible concentrations" in the media market which are beyond comparison lower than the fines prescribed by the Competition Act as a general piece of legislation, for the implementation of a prohibited concentration.

Whereas the media rules set the fines for undertakings for non-notification or implementation of a prohibited concentration which may not exceed 1 million Kuna, the Competition Act for the same infringement envisages a fine in the amount of up to 10 % of the aggregate turnover in the previous financial year. The responsible person of the undertaking concerned may be fined an amount of up to 100,000 Kuna in line with the media sector rules, while the same person is subject to the fine from 50,000 to 200,000 Kuna under the general competition rules. Thus, when it comes to fines, the undertakings in the media sector enjoy a more favourable position than other undertakings.

The above described issues in the media sector encouraged the Agency to launch initiatives with the competent ministries and other institutions directed at necessary changes of the listed inconsistencies and adequate adjustment of the legislative framework concerned.

3.3.1.1 EPH d.o.o., Zagreb/ INFORMATIKA-MEDIJA d.o.o., Sesvete¹⁶

Media merger

After having received the notification indicating the change of ownership in the undertaking INFORMATIKA MEDIJA d.o.o. on the basis of which the undertaking EUROPAPRESS HOLDING d.o.o. (EPH) acquires 51 % of the share capital in the former undertaking, and given that the transaction concerned constitutes a concentration between undertakings EPH was asked to notify the proposed concentration.

In accordance with the complete notification received by the CCA the concentration arises by acquisition of decisive influence of EPH in INFORMATIKA MEDIJA. What followed was a request for information published on the CCA web site which called for all undertakings operating in the electronic media publishing and advertising market (on-line advertising and browsing and exchange of video contents), trade associations, associations of employers, consumers associations and other stakeholders to provide their response on possible significant effects of the concentration concerned on their operation and competition in the markets concerned.

Consequently, the Agency decided to render the concentration between the undertakings EPH and INFORMATIKA MEDIJA compatible taking into account its insignificant effect on competition in the relevant market in electronic media publishing and on-line advertising and browsing and exchange of video contents. The CCA also took into account the fact that prior to the implementation of the concentration in question EPH was not present in the relevant market concerned and that no replies to request for information from the third parties have been submitted.

3.3.1.2 Radio M Youth Association Vela Luka and others, unlimited company, Vela Luka¹⁷

Change in ownership

In line with the Electronic Media Act which provides for obligatory notification of any change in ownership in the electronic media sector the undertaking Radio M from Vela Luka submitted the evidence on the existence of no ownership or

¹⁶ Class: UP/I 030-02/2008-02/37, assessment of compatibility of a concentration in Phase I of 2 December 2008.

¹⁷ Class: UP/I 030-02/2008-02/26, assessment of change in ownership of 12 June 2008.

personal ties with other publisher which would give rise to impermissible concentration and the statement made by new share holders who also claim that there are no personal ties with other publishers which would result in impermissible concentration under the above stated legislative framework.

The competence of the CCA is to assess any change of ownership which might lead to impermissible concentration under the Electronic Media Act. In this particular case, it was evident that the equity participation of the acquirer now amounts to 40 % of the share capital. Thereby, taking everything stated above into consideration, and without opening of the formal procedure in this particular case, the Agency found that the ownership change in the share holding structure does not lead to significant prevention, restriction or distortion of competition within the meaning of the Competition Act and as such does not constitute an impermissible concentration under the Electronic Media Act.

3.3.2 Food retail mergers

In the past two decades the food retail market in non-specialized stores has undergone significant transformations and changes which were once hard to imagine. On the other hand, the food retail sector is particularly sensitive in terms of consumers' interests.

First of all, the relationship between the retailers and their suppliers (manufacturers and whole sale) has changed. Whereas couple of years ago the suppliers dictated the terms for the buyers, nowadays the pressure from the latter is increasing and the roles completely changed.

The retailers' market increasingly and significantly changes. Retail chains of significant and negotiating power are being created. This agglomeration arises, on one hand, in the form of ownership ties and creation of horizontal mergers, on the other hand, the undertakings in the retail market who are not yet ready for ownership linkages, create strategic associations and enter into contractual relations resisting competition by big retail chains and trying to negotiate better terms with suppliers.

This resulted in the situation where the retail dictates margins and rebates to suppliers. Favourable margins and rebates may be dictated, as a rule, by buyers of significant market power and large distribution networks. Thus, the retail prices may vary significantly. On the other hand, this situation makes the possibility of fixing the margins and rebates between both retailers and whole sale almost unlikely.

Furthermore, the issue of slotting allowances was almost unknown earlier. Different forms of fees paid by a vendor or manufacturer to a retail chain or establishment for making room for a product on its store shelves are often criticised from the point of view of competition rules, making them the central subject of a numerous international competition conferences. "Hello money" generally does not produce anticompetitive effects based on the fact that "competition for a store shelf" is big, whereas sellers

dispose over limited retail capacities. Hence, slotting fees are not *a priori* prohibited under the competition rules. If there are competition concerns or claims, they must be appraised in each particular case.¹⁸ However, the use of rebates, bonuses and slotting allowances may also have negative effects on competition. In some cases, such payment schemes foreclose actual or potential competition or put some parties at a disadvantage, for instance if they receive a higher rebate from a dominant supplier than their competitors without any objective reason. For the consumers the results of such exclusionary practices are higher prices and a poorer product range.

Second, in the situation where the retail dictates the terms to the suppliers, vertically integrated systems are becoming more often. These systems combine the production of food, wholesale and retail. At the same time, the sellers launch their own brand products and become serious competitors of their suppliers. What is more, this enables them access to information on production costs, input suppliers etc. Their negotiating position strengthens.

Third, changes in consumers' preferences and habits create new retail formats. Changes due to new information technologies make a consumer well informed in terms of quality, nature and the price of a product. Improvements in consumers' mobility and requirements in terms of quality of the service increase the awareness of their power. On the other hand, demand for quality service becomes more important, time reserved for shopping shortens but the value of individual purchase rises. Family shopping which includes other contents besides food retailing (such as other stores, patrol stations, theatres, coffee bars and restaurants, play-rooms etc.) becomes extremely popular.

Thus, a sign of the times and new consumer behaviour influenced the creation of large super markets and hyper markets outside the city centre and disappearance of small neighbourhood shops. What is more, even patrol stations include some popular food products on their shelves.

The food retail market in the Republic of Croatia shows the trend of the most developed and the most dynamic economic activity characterised by consolidation and agglomeration and entrance of foreign retail chains. The market is open and dynamic. Retailers come together and create joint supply chains, whereas producers and suppliers cooperate with retailers and launch private brand products.

The Croatian food retail market indicates no significant entrance barriers and initial costs are low enough not to discourage entrants. The changing trend in this area indicates a dynamic market where new competitors easily enter the market and where their market shares constantly vary. At the same time, small undertakings disappear from the market due to competitive pressure. Practically, administrative barriers do not exist. Requirements concerning the retail outlets, facilities and infrastructure are those traditionally found in commercial usage.

¹⁸ "Nordic Food Markets - a taste for competition" http://www.kilpailuvirasto.fi/tiedostot/Nordic_Food_Markets.pdf

In 2008 the CCA continued with its market study in the relevant retail and wholesale food market in the territory of the Republic of Croatia. The market study included 57 undertakings with highest turnover, whereas the aggregate turnover of the undertakings operating in the retail and wholesale market within the territory of the Republic of Croatia in 2008 was HRK 28.6 billion.¹⁹

3.3.2.1 Konzum d.d., Zagreb / Lokica d.o.o., Drniš (Jolly JBS d.o.o.)²⁰

Conditionally compatible concentration

The CCA declared the concentration between the undertakings Konzum d.d. from Zagreb and Lokica d.o.o. from Drniš conditionally compatible on the basis of the fact that this is a horizontal merger which on one hand, may produce rather significant anticompetitive effects in the groceries retail market in the territory of Šibenik-Knin County, particularly in the towns of Šibenik, Vodice and Murter (overlapping markets of both parties to the concentration), with, on the other hand, possible anticompetitive effects in the groceries wholesale market in the territory of the Republic of Croatia.

However, the competition concerns, in the view of the Agency, may be eliminated. Therefore it imposed conditions and obligations which must be satisfied by the undertakings parties to the concentration in order to restore effective competition in the retail market (structural measures), whereas at the same time behavioural remedies are to be introduced in the wholesale market within the territory of the Republic of Croatia where the existing suppliers of the undertaking Jolly-Jbs d.o.o., whose legal successor – the undertaking Lokica d.o.o. is the party to the concentration, should be ensured free access to the market concerned.

In concrete terms, this means the undertaking Konzum d.d. should dispose of altogether seven outlets within a one-year period – four of its retail outlets in Šibenik, two in Vodice and one in Murter which had been acquired through the implementation of the concentration in question from the undertaking Lokica d.o.o., or terminate the lease contracts or transfer the outlets to a suitable purchaser. The Agency particularly specified which outlets should be disposed. However, the CCA did not interfere in the structure of the market consisting of so called "small outlets", although Konzum holds a rather high market share of some 40 % - 50 % in the market concerned. The reasoning of the CCA is based on the fact that in this market segment there is a significant rising pressure of the competing undertakings, such as Djelo d.o.o. who increased its market share to some 35 % to 45 % in a very short period of time. Thus, divestiture measures concentrate on super markets where the market share held by Konzum will fall by

¹⁹ The market analysis is also available at: <http://www.aztn.hr/slike/trgovina%202008.pdf>

²⁰ Class: UP/I 030-02/2008-02/06, decision on conditionally compatible concentration of 30 December 2008, OG 14/2009 and <http://www.aztn.hr/slike/koncentracija%20Konzum%20d.d.%20i%20Lokica%20d.o.o..pdf>

more than 20 % and amount to 45 % and 55 %. Its market share relating to supermarkets will fall under the 40 % threshold. This market segment is also characterized by raising competition, such as from the undertakings Plodine d.d. and Lidl d.o.o.k.d. In summary, the structural measures concerned will result in the market share held by Konzum in Šibenik-Knin County to fall from more than 50 % to some 40 %.

With the view to protecting the interests of suppliers the Agency decided that at the same time Lokica d.o.o. (or the preceding undertaking Jolly Jbs d.o.o.), the undertaking controlled by Konzum, should keep in effect all the agreements that had been concluded before the implementation of the concentration concerned with the suppliers of all products serving retail and wholesale customers for at least two years. In addition, the terms of sale, the time-limits and conditions for payment arising from the existing agreements concluded between the undertakings Lokica d.o.o. and Jolly Jbs d.o.o. must remain the same or be even more favourable, non-discriminatory and transparent for all buyers. The existing suppliers of Jolly Jbs have been thus ensured access to the relevant market concerned.

3.3.2.2 Gavrilović d.o.o., Petrinja / Istracommerce d.d., Pazin²¹

Concentration clearance in Phase I

The CCA decided not to oppose the concentration between the undertakings **Gavrilović d.o.o.** from Petrinja and **Istracommerce d.d.** from Pazin whereby the former undertaking acquired control over the latter through acquisition of a majority of the share capital.

On the basis of the data from the notification it has been established that this merger will not produce significant effects on affected markets. Beyond any doubt it could be established that the implementation of the concentration concerned would not create or strengthen a dominant position of the parties to the concentration in the relevant markets. After the implementation of the concentration the **market share of the undertaking Gavrilović will not exceed 5 %** in the grocery retail market on the territory of Primorje-Gorski Kotar County, whereas the same market share on the territory of Istra County will remain less than 12 %. The market share of **Gavrilović group in the grocery wholesale market on the entire territory of the Republic of Croatia will not exceed 2 %**.

However, the concentration in question, and in spite of having been assessed as compatible, raised competition concerns of the CCA who will make a claim to the **minor offence court against the undertaking Gavrilović given the fact that the**

²¹ Class: UP/I 030 030-02/2008-02/28, assessment of compatibility of concentration – Phase I clearance of 2 December 2008.

concentration had been effected without due notification. Only after the Agency found that the concentration in question had been illegally implemented, it asked the undertaking in question to submit the necessary data on the transaction. In accordance with the decision of the competent minor offence court, Gavrilović was fined HRK 100,000 and the responsible persons of that undertaking HRK 15,000.

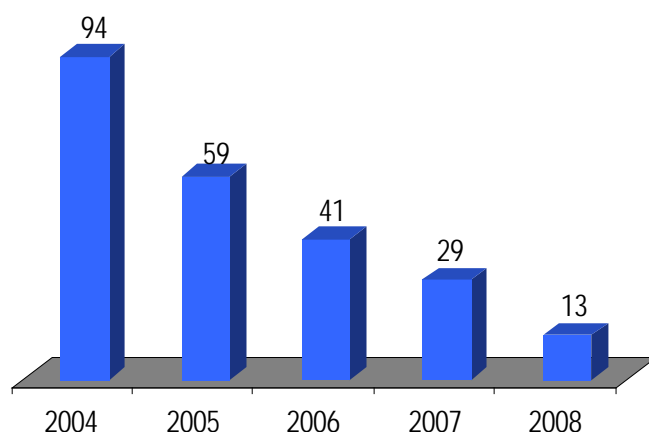
3.4 Competition advocacy and CCA in the media

Competition advocacy includes raising awareness and understanding of the benefits of competition, its role and importance, within the business community, the government, trade unions and consumers, judges and other stakeholders. Namely, under certain circumstances the existing rules and actions by the government authorities and institutions may have the same anticompetitive effects as particular practices by individual undertakings. Therefore, a critical approach to laws and other rules which may, directly or indirectly impede competition is one of the strategic tasks of this Agency.

The CCA gives opinions on draft laws and other legal acts and thereby draws attention of the law maker to the relevant aspects from the area of competition or certain provisions which may lead to distortion of competition. This proactive policy of the Agency includes not only its opinions on laws and other legal acts as to their compliance with competition rules but also regular press releases, seminars and workshops for undertakings, lectures at universities, publication of papers and articles related to the subject etc.

The transparency of the work of the CCA, particularly in terms of its decisions and opinions and work of its Competition Council is ensured on its web site (www.aztn.hr).

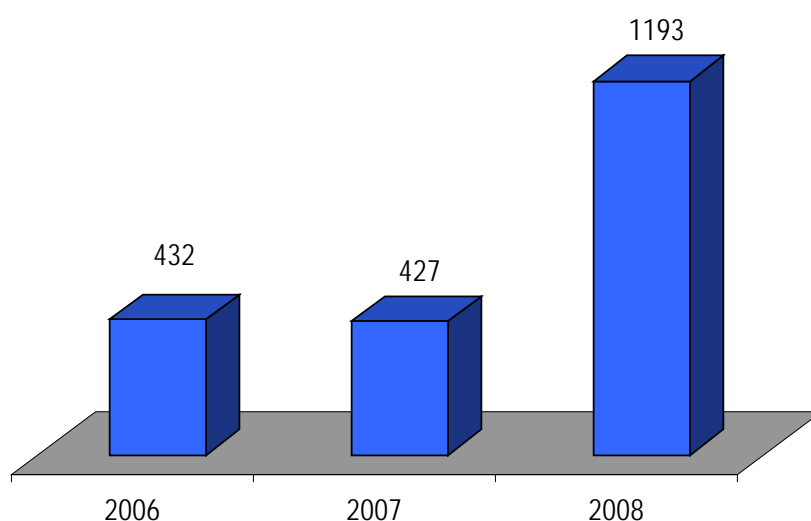
Picture 4 Number of issued opinions 2004 – 2008



Source: CCA

The Agency's efforts in the area of competition advocacy have had good results, especially concerning its presence in the media. During 2008 there were 1,193 published articles in the daily papers or business weeklies about the Agency or competition law and policy. In comparison with the recent years the ratings of the Agency indicate a positive trend – the Agency appears more often in the media and the perception of the public is more positive than before. Its openness to the media and its readiness to respond to any inquiry of the interested parties, institutions, consumers or the press concerning its work is apparent.

Picture 5 Media appearances 2006 – 2008



Source: CCA

What is more, not only are the press releases of the CCA cited in the press, there are also reactions of the undertakings in the market, competition experts, European Commission and journalists. The news on the rulings of the competent courts in the area of competition was also found in the media, together with the modifications of the legislation which was the direct consequence of the intervention of the Agency. In addition, the Annual Report of the CCA for 2007 also found its place in the media together with the comments of the representatives on the adoption of the new Competition Act. For example, here are some most interesting headlines: "How much do we lag behind EU?" (Privredni vjesnik, 29.09.2008), "EU warns against ineffective sanctions", (Novi list, 1 October 2008), "Kolnoa and PZ Auto infringe competition rules" (Poslovni dnevnik, 25.07.2008), "Textiles industry gets 129 million Kuna State aid" (Vjesnik, 04.11.2008), "CCA authorises aid to shipbuilding" (Business.hr, 02.07.2008), "Audits must obey competition rules", (Vjesnik, 08.11.2008), "News from the Parliament – Stricter sanctions for anticompetitive behaviour" (Business.hr, 17.10.2008) etc.

Most part of the published materials covered the area of antitrust and merger control, whereas the state aid issues were represented in the cases where the Agency authorised state aid of relatively greater importance and effect for both the national

economy and the general public. Most of the features had a positive tone. However, negative connotations were merely used in terms of the addressed topic and did not reflect the general attitude or perception of the Competition Agency.

3.4.1 Opinion on the proposed draft Credit Institutions Act

In its opinion on the proposed draft the CCA established that Article 71 of the draft Credit Institutions Act provides for the jurisdiction of the Croatian National Bank (CNB) in the area of competition relating to provision of banking and financial services in connection with Article 376 thereof which states that on the day of the accession of the Republic of Croatia to the EU the formerly mentioned Article 71 shall lapse and the jurisdiction in competition matters in the provision of banking and financial services shall be transferred to the CCA.

This legal solution which excludes one of the key economic activities from the general set of rules in effect in the area of competition challenges the harmonization of the Croatian legislation in this area with the EC acquis which relies on a uniform application of competition rules in all sectors and thereby ensures effective competition regime.

In addition, the majority of the CNB activities in the area of competition focus on merger control, whereas abuse of dominance or assessments of agreements have been entirely neglected. In the view of the CCA, it is evident that the CNB has not been engaged in other activities covered by competition rules or, which is less likely, such activities give rise to no competition concerns and thereby infringements of Competition Act.

Taking into account the commitments undertaken by the SAA in respect of approximation of Croatian laws in the area of competition, legal certainty of the parties, a uniform application of the rules and the generally accepted principle of central competence of one competition authority, the CCA proposed the adequate review of the provisions concerned.²² The competence of one authority (in this case the Competition Authority) would ensure effective enforcement of competition rules in all sectors within the territory of the Republic of Croatia, application of general competition rules in the sector concerned, notification of all concentrations in the banking sector regardless of the turnover of the parties to the concentration with a prior opinion issued by CNB on the possible effects of the concentration concerned. This particularly under the circumstances when one authority, the CCA, will shortly be empowered to impose fines in respect of infringements of competition rules in all sectors.

However, the proposal of the CCA was not adopted in the Draft Act on Credit Institutions. Practices of undertakings in the banking sector, including the

²² No EU Member State has such a split jurisdiction under the established competition regime regarding the provision of banking and financial services in force.

conclusion of restrictive agreements, abuse of dominance and merger control remain under the jurisdiction of the CNB.

3.4.2 Opinion on the proposed draft Electronic Communications Act

In its opinion on the proposed draft Electronic Communications Act the CCA found that Article 68 thereof relating to assessment of concentration was not brought into compliance with the provisions of the Competition Act.

Article 68 par 1 establishes the obligation of all operators to notify to the CCA any planned merger or acquisition of control or full function joint venture which fall under the notification obligation within the meaning of competition rules. At the same time par 2 provides for the obligation of operators holding appreciable market power and operators holding concession in the territory of the Republic of Croatia to notify to the Croatian Agency for Postal Services and Electronic Communications (HAKOM) any planned merger, acquisition of control or prevailing influence in the company of the operator, joint venture in the area of electronic communications, regardless of the criteria specified under general competition rules.

The CCA found the wording of Article 68 unclear and misleading. With the objective of legal certainty the CCA proposed the modifications of the text concerned proposing that any concentration under notification obligation in the sense of competition rules should be assessed by the CCA on the basis of a preliminary opinion issued by HAKOM. Article 68 par 2 was also proposed the necessary revisions involving the changes in the text and some deletions of the text where it limited the notification obligation relating to any ownership change exclusively to concentrations on the basis of which control or prevailing interest is acquired.

The proposals of the CCA would clearly set the competences of the authorities concerned – empowering the CCA to assess all concentrations falling under the notification obligation whereas the assessment concerned will be carried out taking into account the preliminary opinion issued by the HAKOM. The parties to the concentration would be obligated to notify any planned merger of operators which does not constitute a concentration in line with competition rules to the HAKOM which would then decide thereupon exclusively as a specific regulator.

The Ministry of the Sea, Transport and Infrastructure accepted all the revisions proposed by the CCA and the draft Electronic Communications Act was adequately amended.

3.4.3 Communication of the CCA following the excessive increase in price of goods and services

Following the excessive increase in prices, particularly of utility services and food, and rising inflation, a part of the general public and political environment asked the CCA to assume a role of a price regulator. The CCA responded on 11 January 2008 with the following press release:

"CCA is not a price regulator. CCA is a competition regulator sensitive to distortions of competition where the price increase is the result of prohibited cartels or abuse of a dominant position in the market. Assessment of restrictive agreements between undertakings, establishment of abuse of a dominant position and appraisal of concentrations between undertakings are the main competences of the CCA regulated by law.

The CCA will carry out investigation in respect of price changes only under the circumstances when such increases raise justifiable doubts in respect of practices of particular undertakings whereby they infringe competition rules and not in cases of increase in prices in general. The CCA is sensitive to excessive price increases only if they are the result of a cartel agreement entered into by undertakings who fix prices of particular products or services or where abuse of a dominant position has been established through unfair price practices such as predatory pricing or excessive pricing.

Thus, the CCA is not a price regulator which would methodically monitor prices and excessive price increases. The European Commission itself never aspired to act as a price setting authority already in the Fifth Report on Competition Policy of 1975. However, it is clear that the Commission will make full use of its powers wherever this is necessary to prevent abusive pricing strategies and in particular excessive pricing obstructing effective market entry. This view is also taken by the CCA under its commitments relating to the application of the EC acquis.

Where the initiative is taken towards the CCA concerning the price increases which may be the result of infringements of competition rules the following must be taken into account:

- price levels may change as a respond to aggregate demand or input prices increase such as energy or utility expenses and other objective outside factors;*
- it is less likely that infringement of competition rules is involved if the price increase has been the result of the change of input expenses or that of business conditions in certain markets;*
- CCA is not a price setting authority, neither it may become such a price regulator, it is deals with price discipline only in cases of infringement of competition rules, such as abuse of dominance or cartels;*
- in the event of an established infringement the CCA may initiate and carry out relevant proceedings exclusively against particular undertakings.*

A proactive competition policy of the CCA includes investigations into certain markets. Such investigations have been and will be carried out if there are justifiable reasons to make complex and comprehensive inquiries into specific sectors, whereof the CCA adequately informs the public. Such proactive practices of the CCA advocate the benefits brought about through open markets and free competition."

3.4.4 Comment of the CCA on the alleged existence of anticompetitive provisions under the typical agreements

To the knowledge of the Agency, the undertaking INA d.d. concluded a typical agreement on the sale of its products containing a provision which enables INA to refuse to enter into agreements with buyers against which legal action of any kind are taken.

The CCA requested INA to submit the list of all its buyers of oil derivatives under the typical agreements in force and to revise the Management Decision of 5 January 2007 in accordance to which business cooperation with undertakings that have legal action taken against them will be terminated.

In the view of the Agency the provision mentioned above equals the practice where the conclusion of contracts is subject to acceptance by the other party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts, and as such contravene competition rules. INA was therefore requested to submit evidence on the revisions of the provision concerned.

Given that INA behaved in compliance with the request of the Agency and submitted the necessary evidence, no official proceeding on the establishment of abuse of a dominant position was initiated by the CCA. The submitted evidence also contained four typical sale agreements which did not contain the contested provision and the statement made by the responsible person of INA that future agreements will not contain any restrictive provisions concerned.

3.4.5 Opinion on the text of the Tender for rental of market stalls for trade in fruit and vegetables

Upon the request of the Municipality Starigrad, the CCA established in its opinion that the text of the Tender for rental of market stalls for trade in fruit and vegetables contained a discriminating provision relating to the fact that the tender was open exclusively to natural and legal persons who hold a trading licence or certificate of registration and not to companies registered for the performance of this activity.

Second, in the opinion of the CCA favourable treatment which was given to applicants holding a permanent residence in the territory of the Municipality Starigrad was also found discriminating. Thus, natural persons enjoyed favourable position over legal persons, whereas the residence criteria restricted market entry to applicants who were likely to offer lower prices, higher quality or other benefits for the consumers.

Third, the duration of the rental agreements concerned was 10 years (2008 – 2017). In the opinion of the CCA and in line with competition rules this long time period for agreements may significantly impede competition where access to the market concerned is restricted for potential entrants.

3.5 Cooperation with specific regulators

In 2008 the Agency received 18 queries relating to public procurement issues and the compliance of public procurement procedure with competition rules. These queries also involved complaints in terms of the procedure, calls for tender, selection of applicants and requests for annulment of public procurement procedures etc.

Thus, the CCA intensified its cooperation with the State Commission for Supervision of Public Procurement Procedure whereby the latter delivered to the CCA cases which were assumed to involve conclusion of restricted agreements. A rather significant number of complaints submitted by undertakings indicated discriminatory criteria contained in the text of the tenders and alleged favourable treatment in the public procurement procedure which may lead to distortion of competition. Consequently, the CCA carried out some market studies, such as the investigation of the private security sector, provision of leasing services in certain public tenders etc. The CCA proposed to the State Commission for Supervision of Public Procurement Procedure and the Directorate for Public Procurement of the Ministry of the Economy, Labour and Entrepreneurship conclusion of a cooperation agreement which would, like similar cooperation agreements with other specific regulators which are already in place, facilitate coordination of activities and exchange of experience from both the area of competition and public procurement.

The CCA cooperated successfully with the CNB and other specific regulators such as the Croatian Energy Regulatory Agency, Electronic Media Regulatory Agency, Croatian Financial Services Supervisory Agency (HANFA) and particularly Croatian Agency for Postal Services and Electronic Communications (HAKOM).

4. ADMINISTRATION AND ENFORCEMENT OF THE STATE AID ACT

4.1 Activities of the Agency in the area of State aid

The financial and global economic crisis which was first felt in the USA in the mid 2007 and later on spread to other countries and affected most part of the world economy reminded us of the role of the State when in the time of crisis we focus on eliminating or alleviating its consequences. Nevertheless, even before this crisis struck the modern economic theory and practice of the developed market economies the view has been generally accepted that state aid in any form whatsoever are justifiable if and where they are used to eliminate a market failure or where market forces or its principles fail to generate the necessary economic growth and social developments. These are the situations where the State is expected to intervene in order to facilitate the positive effects in the market functioning as a partner. State aid has always been an instrument of industrial policy; however, its interventions grow in the time of crisis, similarly as the instruments, objectives and level of aid.

The industrial policy of the EU and its Member States recognises State aid as an important instrument of this policy, but at the same time it is a constituent part of competition policy on the basis of which the single Community market has been established. The EC Treaty generally bans State aid which affects or may affect trade between the Member States, given that the uncontrolled favourable position of particular undertakings or sectors would jeopardise the functioning of the common market. Thus, the State aid control is one of the key elements of competition policy within the Community and falls under the competence of its institutions.

By signing of the SAA Croatia committed itself to alignment of State aid rules valid in the Community (Article 70) and application of the relevant EC rules on the accelerating lane to the EU membership.

The Croatian State Aid Act establishes the State aid regime which is in line with the SAA and which sets forth the general criteria, rules under which State aid may be granted and regulates monitoring of the implementation and recovery of State aid illegally granted.

In this area of its jurisdiction the CCA performs, among others, the following activities:

- assesses state aid proposals and aid schemes;
- monitors the implementation and effects of State aid granted and orders recovery of State aid granted or used against the law;
- collects, processes and registers the data on state aid and keeps the enforcement record;

- launches initiatives and gives proposals aimed at improvement of the State aid regime, participates in drafting of laws and issues preliminary opinions on state aid issues contained in legislation;
- cooperates with other competent authorities, central and local, aid providers and aid beneficiaries, international authorities etc.

In line with the State Aid Act in the performance of the activities the Agency is vested with public powers and cooperates with the financial supervision authorities responsible for financial transactions relating to State aid in the Republic of Croatia.

In 2008 the activities of the CCA were focused on the alignment of the legislative framework with the EC acquis in the area of State aid – it gave five preliminary binding opinions on laws in terms of their compliance with state aid rules. These are: the Free Zones Act, the Act on Areas of Special State Concern, the Act on Hilly and Mountainous Areas, the Act on Reconstruction and Development of the Town of Vukovar and the Act on State Aid for Education and Training.

43 aid proposals underwent assessment of the Agency: 18 thereof contained individual aid whereas 25 were aid schemes. The CCA also carried out a comprehensive analysis of the restructuring plans for shipyards. It cooperated with aid providers and aid beneficiaries on the daily basis. A part of its activities involved setting of the reference rate.

4.2 State aid control

As mentioned beforehand in this text, the Croatian state aid regime relies on the commitments undertaken by the Stabilization and Association Agreement (SAA):

Main provisions of Article 70 of the SAA relating to State aid:

The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and Croatia:

- 1. Any State aid which distorts or threatens to distort competition by favouring certain undertakings or certain products.*
- 2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 of the Treaty establishing the European Community and interpretative instruments adopted by the Community institutions.*
- 3. Croatia shall establish an operationally independent authority which is entrusted with the powers to authorise State aid schemes and individual aid grants as well as the powers to order the recovery of State aid that has been unlawfully granted.*
- 4. Transparency in the area of State aid shall be ensured, inter alia by providing a regular annual report, or equivalent (publication of the decisions on State aid in the*

Official Gazette), following the methodology and the presentation of the Community survey on State aid.

5. Croatia shall establish a comprehensive inventory of aid schemes instituted before the adoption of the State Aid Act on 2 April 2003 and shall align such aid schemes with the relevant EC criteria within a period of no more than four years from the entry into force of the Interim Agreement (that is until 1 March 2006).

6. Within three years from the entry into force of the Interim Agreement, Croatia shall submit to the Commission of the European Communities its GDP per capita figures harmonised at NUTS II level. The Agency and the Commission of the European Communities shall then jointly evaluate the eligibility of the regions of Croatia as well as the maximum aid intensities in relation thereto in order to draw up the regional aid map on the basis of the relevant Community guidelines.

7. State aid rules shall not apply to agriculture and fisheries.

4.2.1 Definition of State aid

Neither the EC law nor the Croatian legislation in this area can offer a straightforward definition of State aid. Within the meaning of the State Aid Act it must be assessed on a case-by-case method whether a particular transfer of State resources constitutes State aid.

In line with Article 3 paragraph 1 of the State Aid Act in order for a measure to constitute State aid, four cumulative criteria must all be fulfilled. The measure must:

(1) be granted by the State or through State resources, including the decreased revenue of the State granted in any form whatsoever (such as tax or contributions relief);

(2) represent a financial advantage to a firm or firms which would be received through its normal course of business;

(3) be selective and specific in nature – granted to particular undertakings or where scheme applies to particular regions or economic sectors. A scheme is also considered selective if the authorities administering the scheme enjoy a degree of discretionary power;

(4) have a potential or actual effect on competition and trade between the Republic of Croatia and the EU Member States.

4.2.2 Categories and instruments of State aid

State aid may be granted under a particular aid scheme or as an individual aid measure.

Aid scheme shall mean any legal document on the basis of which, without any additional implementing measures required, individual aid may be granted to ex ante unspecified aid beneficiaries, and any legal document on the basis of which state aid

which is not linked to a particular project may be awarded to one or more aid beneficiaries for an indefinite period of time and/or in an indefinite amount.

Individual aid shall mean any state aid which is not granted under the aid scheme, and any state aid granted under the aid scheme which is subject to additional authorisation.

In line with the State Aid Act there are several aid categories:

Horizontal aid - Cross-industry or "horizontal" rules cover particular categories of aid which are aimed at tackling problems which may arise in any industry or region, such as: aid for small and medium-sized enterprises; aid for research and development and innovation, aid for environmental protection, risk capital measures, aid for services of general economic interest, aid for the rescue and restructuring of firms in difficulty, employment aid, and training aid and aid to promote culture.

Regional aid - This aid category involves aid measures to promote the development of areas where the standard of living is abnormally low or where there is serious underemployment. The aim of such aid is the promotion of the less-favoured areas mainly by supporting initial investment and job creation linked to the investment.

Sector specific aid - Industry specific or sectoral rules apply to particular industries where state aid may significantly impede competition. The separate rules applicable in this context are the following: general sectors (shipbuilding, steel, synthetic fibres industry, audiovisual production, broadcasting, electricity production and postal services), transport (road transport, inland waterways transport, rail transport, maritime transport and air transport) and agriculture and fisheries where state aid to agriculture and fisheries fall outside the scope of the State Aid Act and the jurisdiction of the CCA.

De minimis aid - The ceiling of such aid is EUR 200.000, a grant equivalent of aid to a particular undertaking over a period of three fiscal years. For undertakings active in the road transport sector, the ceiling of such aid is EUR 100.000. De minimis aid is not subject to the notification requirement.

4.3 Activities of the Agency in the area of State aid

In 2008 the CCA closed a total of 73 cases. 25 thereof involved assessment of compatibility of aid schemes, 18 referred to individual aid measures, whereas 30 files included the opinions which were issued upon the request of aid grantors or aid beneficiaries, drafting of the annual report on State aid for 2007, setting the reference and discount rate and participation of the CCA experts in the working group for the alignment of State aid rules.

Table 4 Total number of resolved cases/files in the area of **state aid** in 2008

| Category | No of cases/files resolved in 2008 |
|--|------------------------------------|
| I. ADMINISTRATIVE CASES | |
| 1. STATE AID SCHEMES | 25 |
| 2. INDIVIDUAL STATE AID | 18 |
| Total: | 43 |
| I. NON-ADMINISTRATIVE FILES | |
| 1. PRELIMINARY BINDING OPINION | 5 |
| 2. OPINONS UPON REQUEST OF THE AID PROVIDERS/BENEFICIARIES, SETTING THE REFERENCE RATE AND OTHER | 25 |
| Total: | 30 |
| Total ADMINISTRATIVE + NON-ADMINISTRATIVE cases/files (I.+II.): | 73 |

Source: CCA

Out of 43 administrative cases involving the assessment of compatibility of aid schemes and individual aid measures, 14 proved to be compatible with the State Aid Act, 8 cases involved de minimis aid, in 8 cases the measures concerned did not constitute aid, in 2 cases state aid was found incompatible, in 1 case the CCA dismissed the aid proposal, whereas in 1 case recovery of state aid granted was ordered.

The remaining 9 cases were closed by means of a procedural order on suspension of the proceedings due to a preliminary issue (in five shipbuilding restructuring cases), two cases were terminated due to incomplete data (restructuring of the firms in difficulty) and one case was dismissed due to lack of competence.

Table 5 Adopted decisions in the area of **state aid** in 2008

| Decision type | No of decisions adopted in 2008 |
|--|---------------------------------|
| 1. AID COMPATIBLE WITH THE STATE AID ACT | 14 |
| 2. DE MINIMIS AID | 8 |
| 3. NO AID DECISION | 8 |
| 4. INCOMPATIBLE AID | 2 |
| 5. RESOLUTION ON DISMISSAL | 1 |
| 6. DECISION ON RECOVERY | 1 |
| 7. RESOLUTIONS (ON SUSPENSION OF THE PROCEEDINGS DUE TO OCCURENCE OF PRELIMINARY ISSUE, ON TERMINATION OF THE PROCEEDINGS AND ON DISMISSAL FOR LACK OF COMPETENCE) | 9 |
| Total: | 43 |

Source: CCA

39 cases were initiated upon the request of aid provider, 3 were opened *ex officio*, whereas one case was opened upon the request of an undertaking. In one case the

decision of the Agency on suspension of the proceedings relating to authorisation of restructuring aid was challenged at the Administrative Court of the Republic of Croatia.

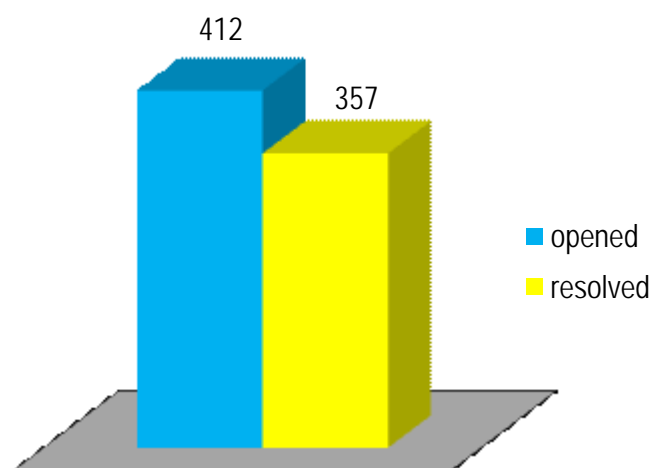
Table 6 Administrative proceedings in the area of **state aid** in 2008

| Proceeding was initiated | No of cases in 2008 |
|---------------------------------|---------------------|
| 1. UPON REQUEST OF AID PROVIDER | 39 |
| 2. EX OFFICIO | 3 |
| 3. UPON REQUEST OF UNDERTAKING | 1 |
| Total: | 43 |

Source: CCA

From 2003 when the first State Aid Act entered into force to the end 2008 the CCA registered a total of 412 cases involving authorisation of state aid, opinions, statements etc. 357 cases thereof were solved by the end of 2008, which makes 87 % of the total registered cases.

Picture 6 Registered and resolved cases/files in the area of **state aid** 2003 – 2008



Source: CCA

The majority of the cases involved assessment of compatibility of aid schemes (some 58 %). Mostly these were cases where the CCA issued its binding opinion on laws relating to authorisation of regional aid contained in fiscal laws (the Free Zones Act, the Act on Areas of Special State Concern, the Act on Hilly and Mountainous Areas, the Act on Reconstruction and Development of the Town of Vukovar) and gave its opinion on

regional aid map. A part of aid schemes contained aid to maritime transport, aid for shipbuilding, research and development aid, aid for book publishers, to the textiles and automotive parts industry.

Individual aid was dealt with in the shipbuilding and steel sector (assessment of restructuring plans), production of plastic products, bricks and roofing-tiles, motor vehicle parts and accessories industry, newspapers publishing industry and assessment of support awarded to Zagrebački električni tramvaj and Hrvatska radiotelevizija.

4.3.1 Preliminary binding opinion

In line with the State Aid Act before any draft proposals for laws which contain state aid are submitted to the Government of the Republic of Croatia, ministries and other public administration authorities must notify the state aid proposals to the Agency for a preliminary binding opinion. In 2008 the Agency gave its positive opinions in respect of the following draft laws:

- Draft Law on Amendments to the Free Zones Act,
- Draft Law on Amendments to the Act on Areas of Special State Concern,
- Draft Law on Amendments to the Act on Hilly and Mountainous Areas,
- Draft Law on Amendments to the Act on Reconstruction and Development of the Town of Vukovar, and
- Draft Law on Amendments to the Act on State Aid for Education and Training.

4.3.1.1 Preliminary binding opinion on the Draft Law on Amendments to the Act on Areas of Special State Concern

The CCA gave its opinion on the revised Act on Areas of Special State Concern upon the request of the Ministry for Regional Development, Forestry and Water Management.

The CCA reminded the relevant sponsor of the act that in line with the de minimis state aid rules with the view to ensuring transparency besides the designated amount of aid which may be granted it is also necessary to specify the cases where de minimis aid excludes aid to export-related activities towards third countries or Member States, aid granted to undertakings active in the coal sector, aid for the acquisition of road freight transport vehicles granted to undertakings performing road freight transport for hire or reward and aid granted to undertakings in difficulty.

In addition, given that the total de minimis aid granted to any one undertaking shall not exceed EUR 200,000 over any period of three fiscal years and the total de minimis aid granted to any one undertaking active in the road transport sector

shall not exceed EUR 100,000, the CCA proposed the adoption of an ordinance which would regulate the competent authority in charge of monitoring the cumulation of aid granted to aid beneficiaries in the areas of special state concern.

4.3.2 Proposed Decision on the regional aid map

In compliance with Article 70 of the SAA the adoption of a regional aid map was a prerequisite for the award of regional aid. The CCA cooperated with the sponsor and the Commission throughout the alignment procedure.

Based on the decision of the CCA the Government of the Republic of Croatia adopted the Decision establishing the regional aid map of Croatia in its session of 7 May 2008 (OG 52/2008), in line with the Regulation on state aid (OG 50/06), the Decision of the Government of the Republic of Croatia on publication of the lists of state aid rules (OG 121/2006) and the Guidelines on National Regional Aid for 2007 – 2013, OJ C 54, 4.3.2006).

In accordance with the Decision establishing the regional aid map of Croatia in Northwest Croatia the aid ceiling for regional aid must not exceed 40 % GGE (gross grant equivalent) for large companies, in Central and East (Panonian) Croatia and the Adriatic coast Croatia the aid ceiling for regional aid must not exceed 50 % GGE for large companies. The aid ceiling may be increased by 10 percentage points for medium sized enterprises and for small enterprises by 20 percentage points.

In line with the State Aid Act before the adoption of a legal act on the basis of which regional aid is granted aid providers (ministries, other central and local administration units and legal persons administering regional aid in Croatia) must notify their proposals to the Agency. The Agency authorises the proposals if they meet the criteria for exemption from the general ban under Article 4 paragraph 3 of the State Aid Act.

4.4. State aid for rescuing and restructuring

State aid for rescuing and restructuring of firms in difficulty is considered to be a State measure which may most significantly impede competition. Keeping the failing firms afloat and restoration of their long term viability through State aid puts them in a more favourable position in respect of their competitors who must rely on their own resources if they want to survive on the market.

However, rescue and restructuring aid may be granted under certain conditions. The Decision on the publication of the rules on state aid for rescuing and restructuring firms in difficulty (Official Gazette 20/2007) provides for the rules applicable to undertakings in all sectors, except to those operating in the coal or steel sector, agriculture, fisheries

and aquaculture. General terms of granting aid in line with the mentioned Decision are as follows:

- the undertaking must qualify as a firm in difficulty,
- aid beneficiary must draw up a restructuring plan which must restore the long-term viability of the firm,
- aid beneficiary will be expected to make a significant contribution to the restructuring plan from its own resources involving capacity reduction,
- restructuring aid may not be granted where less than 10 years elapsed since the restructuring period ("one time, last time" principle).

Rescue aid and restructuring aid involve different processes.

Rescue aid is by nature temporary and reversible assistance to a firm in difficulty. Its primary objective is to make it possible to keep an ailing firm afloat for the time needed to work out a restructuring or liquidation plan. Moreover, the rescue aid must be limited to the minimum necessary and may not exceed six months.

Restructuring, on the other hand, usually involves one or more of the following elements: the reorganisation and rationalisation of the firm's activities on to a more efficient basis, typically involving the withdrawal from loss-making activities, diversification in the direction of new and viable activities, financial restructuring etc.

Rescue and restructuring rules have also been applied by the CCA in the shipbuilding and steel sector. Given their importance and comprehensiveness these sectors have been described separately further in this report.

In 2008 the CCA assessed 13 restructuring plans, 3 thereof were authorised (Željezara Split d.d., CMC Sisak d.o.o. and Razvitak d.d.), 2 cases were terminated on the basis of the withdrawal of notification (Naronaplast d.o.o. and Kordun d.d.), there was one case where recovery of aid was ordered (Elcon d.d.), whereas 5 cases were suspended (restructuring of Croatian shipyards).

4.4.1 Elcon d.d. restructuring plan – incompatible aid

The CCA received from the Ministry of the Economy, Labour and Entrepreneurship the request for authorisation of state aid for restructuring of the undertaking Elcon d.d. from Zlatar Bistrica in the form of a debt-equity conversion scheme, state guaranty and loan to the undertaking concerned.

In the assessment of the restructuring plan the CCA proved that the restructuring plan does not ensure long term viability of the company concerned in line with paragraphs 34 and 37 of the relevant rescue and restructuring rules. The plan did not provide for a turnaround that will enable the company, after completing its restructuring, to cover all its costs and it did not show a return to viability within

a reasonable time scale and on the basis of realistic assumptions as to future operating conditions. In addition, the contribution to the restructuring was much lower than the prescribed 50 % for large firms, in this particular case it was 2.46 %. On the other hand, in order to ensure that the adverse effects on trading conditions and distortion of competition are minimized as much as possible, compensatory measures in the form of liquidation and possible divestment of assets which must be taken were in the opinion of the Agency not regarded as proportional.

Given the results of the analysis of the restructuring plan the CCA established that the restructuring plan did not comply with rules on State aid for rescuing and restructuring and refused to give it its approval within the meaning of Article 13 paragraphs 1 and 2 of the State Aid Act. The proposed state guarantee for the loan and the proposed conversion of debt into equity could consequently not be given the Agency's clearance.

What is more, the already granted aid to the undertaking concerned could not be given ex post approval and was declared illegal. The Agency declared the granted state aid incompatible with the rules on state aid and ordered recovery of illegally granted aid increased for the amount of legal interest on arrears from the date when aid was used in line with Article 14 paragraph 1 of the State Aid Act.

The Ministry as aid grantor must inform the Agency on any steps taken or measures planned in terms of recovery of aid within the period of two months from the receipt of the CCA decision or within six months at the latest.

Within the proceeding it was established that the Ministry and other aid providers included a part of aid concerned in the bankruptcy estate of the undertaking Elcon d.d. to settle the debt. Thus, it may be assumed that certain steps have already been taken as regards recovery of the illegally granted state aid.

4.5 Shipbuilding

On the basis of the Resolution of the Government of the Republic of Croatia of 22 August 2002 the Ordinance on grants to shipbuilding and Ordinance on grants to small shipbuilding have been adopted. The Resolution stipulated that the government will subsidize shipbuilding in the Croatian yards with at least 10 % of the sales price of the projects contracted to be delivered until 31 December 2006.

The traditional subsidizing of the Croatian shipbuilding sector has been facilitating the operation and maintaining competitiveness of the Croatian shipyards for decades. Nevertheless, in the last ten years the majority of the shipyards, in spite of state aid which has been granted to them in the form of grants and state guarantees, start to make losses.

In line with the state aid rules for rescuing and restructuring the shipyards concerned are regarded firms in difficulty. Thus, the only legitimate way to ensure long-term viability of the Croatian shipyards was to adopt a viable restructuring plan with the view to rescuing the sector concerned and restoring its viability on the market principles.

Rescuing and restructuring of the Croatian shipyards started in December 2005 when the Croatian government issued the Decision on the establishment of a Committee for the preparation of the Draft National Programme for Restructuring of the Croatian Shipbuilding Industry.

In the second half of 2006 the Agency received from the Ministry of the Economy, Labour and Entrepreneurship four requests for approval of rescue aid for the shipyards concerned.

The Agency authorised rescue aid in the form of state guarantees for shipyards in the total of HRK 4.2 billion on 21 September 2006. Out of the above mentioned total sum HRK 1.7 billion was granted to Brodosplit Brodogradilište d.o.o., HRK 625 million to Brodotrogir d.d., HRK 1.7 billion to 3. Maj brodogradilište d.d. and HRK 221 million to Brodogradilište Kraljevica d.d. In line with its decision of 18 January 2007 Brodosplit Brodogradilište specijalnih objekata d.o.o. was awarded rescue aid in the amount of HRK 140 million.

One of the conditions for granting rescue aid was for all shipyards to draft individual restructuring plans and submit them to the Agency for assessment within six months following the receipt of rescue aid or by 21 March 2007 at the latest.

The restructuring plans were submitted within the prescribed period to the CCA and the European Commission. It must be noted that the adoption of viable restructuring plans for each particular shipyard is one of the criteria for the opening of the EU accession negotiations in Chapter 8: Competition policy.

During 2007, supported by the team of shipbuilding experts hired by the European Commission and the German experts from the Phare 2005 twinning project, the Agency analysed in detail the restructuring plans for each shipyard. The analysis established that all shipyards (with exception of Uljanik) are facing rather serious financial problems and technologically lag behind so that significant efforts are needed, by both the managements of the shipyards and the shipyard owners, to revise the proposed restructuring plans.

Namely, based on the data and information contained in then submitted restructuring plans, it was not possible to give a positive assessment of the shipyards' sustainability on the market once the restructuring process has been completed and to guarantee their long-term viability without aid. It was therefore that after the first assessment had been carried out by the Agency in February 2008 the restructuring plans were submitted to the competent ministry for revision.

Here are the most important findings of the CCA:

- *The restructuring plans for the time period from 2007 to 2012 do not entail sufficient data which would support the plans and indicate in an objective and consistent manner that a transfer to profit-making business operations is realistic; the description of the circumstances which led to the shipyards' difficulties lacks further clarifications; the market analysis considering the construction of the planned types of ships is unsatisfactory and for most shipyards it does not contain even minimum projections of what might happen in the case of a change of trends in the market; there is no assessment of the impact of different variations in the steel price or the exchange rate and there are no appropriate protection mechanisms provided in such cases; furthermore, there is no detailed cost and restructuring phases analysis regarding the implementation of the restructuring measures.*
- *The productivity level of the shipyards is far below the competitors' productivity level and there are not enough substantial arguments which would support the restructuring plans and projections according to which their productivity would grow within the period of four years so as to reach the comparable productivity level of their competitors.*
- *No shipyard drafted a clear and comprehensive performance improvement programme which would include concrete steps and planned initiatives for productivity growth and operation efficiency.*
- *The total amount of EUR 255.9 million is proposed for new investments whereas EUR 220 million thereof is aimed at shipbuilding. The consultants estimated that the restructuring could be successfully carried out using 50 % of that amount.*
- *The proposed compensatory measures vary from one shipyard to another but taken as a whole they are still most probably insufficient. However, it is not possible to assess them in the given moment since the data on the total aid amount have not been submitted;*
- *There is either no own contribution to restructuring or it is very low.*
- *In determining the level of necessary aid the difference between the concession fee paid by the shipyards and the fee which should be paid under market conditions (the difference between the market value of the concession and the amount paid by the shipyards is state aid) was not taken into account. After the restructuring period the concession will have to be calculated according to its market value and that is an additional cost for the shipyards which must be calculated in the future.*

Consequently, on 21 May 2008 the Croatian government took a Decision on privatization of the following shipyards: Brodograđevna industrija 3. Maj d.d., Brodograđevna industrija Split d.d. (Brodosplit), Brodotrogir d.d., Brodogradilište Kraljevica d.d., Brodosplit – Brodogradilište specijalnih objekata d.o.o. and Uljanik Pula d.d. On 29 July 2008 the CCA passed the resolution by means of which it suspended the procedures initiated on the basis of the application of the Ministry of the Economy,

Labour and Entrepreneurship and authorising state aid in the shipbuilding sector within the existing restructuring plans for the following shipyards concerned.

The decision of the Agency is in compliance with the Decision of the Government of the Republic of Croatia of 21 May 2008 which stipulates that the privatization of the shipyards will be carried out in line with specific rules contained in the Privatization Act. Legally speaking, the privatization process is thereby to be understood as a preliminary issue in the procedure carried out by the Agency pursuant to the provisions of the State Aid Act, given that without a preliminary issue being resolved the Agency cannot close the authorising procedure based on the existing individual restructuring plans drawn by the managements of the shipyards concerned. In line with the above mentioned Decision of the government it is the responsibility of the new investors who will be selected in the privatization process for every individual shipyard to work out the investment plans and business plans pursuant to which restructuring of the shipyards in difficulty will be carried out and a long-term viability of their businesses restored under normal market conditions and within the meaning of the rules concerning state aid for restructuring of the firms in difficulty.

Within the meaning of the decision taken by the CCA, the authorisation process concerning state aid for the shipyards in question will be resumed after the Agency has been communicated by the Ministry of the Economy, Labour and Entrepreneurship and the Croatian Privatization Fund that the privatization process is completed and after it has been submitted the relevant investment plans, business plans and other necessary documentation consistent with the valid state aid rules.

4.6 Steel

In line with the obligations arising from Article 70 of the SAA, and Protocol 2, as its constituent part, the Government of the Republic of Croatia adopted on 28 February 2007 the Restructuring Programme for the Croatian Steel Industry for 2007 – 2011 (the National Restructuring Programme), which is formally considered as the start of the restructuring process in the steel sector.

In the sense of the rules on State aid for rescuing and restructuring firms in difficulty the only legal basis for the undertakings Željezara Split d.d. and Valjaonica cijevi Sisak d.o.o. to be granted aid were viable restructuring plans. The restructuring plans were submitted to the Agency but in the meantime public tender for the privatization of the steel works in question was published and the final decision of the CCA was postponed until the new investors – owners of the steel works – have worked out their restructuring plans.

On 3 August 2007 a share transfer contract was entered into between the Croatian Privatisation Fund and the undertaking Zlomrex S.A., Poraj, Poland. On 20 July 2007 a contract on the transfer of share holdings of Valjaonica cijevi Sisak was concluded whereby the company Commercial Metals International AG Baar Switzerland (CMI)

became the sole owner of the company which remains in business under the name CMC Sisak d.o.o.

The new owners of the steel works have drawn up the business plans for the period 2007 to 2011 which have been harmonized with the National Restructuring Programme and Protocol 2 of the SAA and subsequently reported to the Agency.

After the CCA assessed the viability of the submitted restructuring plans and adopted its decision on 17 June 2008. The restructuring plans provided for the total aid level in the period from 2002 – 2007, established the capacities of the steel works until 2011 and defined own contribution of the new investors in the total restructuring costs. However, the effects of the global financial and economic crisis hit also the Croatian steel sector and caused disturbances on the market concerned. The end of 2008 was marked by output reductions in both steel works, which was mainly due to the new circumstances in the world market relating to collapse in demand for the relevant products. This rendered the process of restructuring more difficult (as in CMC Sisak) or it has even been brought to a halt (as in the case of Željezara Split). The National Restructuring Programme will have to be revised accordingly.

4.7 Services of general economic interest

In line with the State Aid Act and Article 4 paragraph 3 item e) thereof the CCA is entrusted with the assessment of state aid to legal and natural persons which are in accordance with special rules entrusted with the operation of services of general economic interest (such as public transport, rail and maritime passenger transport, public broadcasting etc.) or granted special rights to perform tasks assigned to them in the public interest, where in the case of absence of such aid these persons would be obstructed in the performance of the particular tasks assigned to them and provided that the aid in question exclusively covers the compensation for the performance and implementation of the tasks concerned.

Thus the CCA decides (in the sense of the judgment in Altmark), on the fulfilment of the conditions under which public service compensation does not constitute State aid as follows:

"[...] First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. [...].

[...] Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. [...]

[...] Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit [...].

[...] Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations."

4.7.1 Support for coastal maritime transport²³ - SGEI

The CCA assessed the compatibility of the Short Sea Shipping Aid Scheme submitted by the Ministry of the Sea, Transport and Infrastructure providing for financial transfers in the form of grants to the undertaking Lošinjska plovidba – Brodarstvo d.d., Mali Lošinj. Attached to the aid scheme was the report on state aid for maritime cabotage "Blue Motorway" – a pilot aid scheme for 2008.

On the basis of the above mentioned Short Sea Shipping Aid Scheme the competent Ministry will subsidize the shipping company Lošinjska plovidba – Brodarstvo d.d. for the provision of short sea coastal services on the lines connecting Gioa Tauro (Italy) – Bar (Montenegro) – Split – Zadar, and Gioa Tauro – Ploče in the three-year period from 2008 – 2010.

The Ministry states that the shipping company Lošinjska plovidba – Brodarstvo d.d. is the only national ship operator in the Republic of Croatia with no competition within the Croatian ship operators' network performing great sea shipping who entered into binding contracts with mega ship operators and performs feeder services which, among other operations, include short sea shipping. In addition, the 1999 Transport Development Strategy promotes the development of liner shipping with the aim of improving the Croatian foreign trade, attracting freight transit transport from the neighbouring countries and using the Croatian sea ports and transport infrastructure and at the same time improving a safe, efficient, and environment friendly maritime transport and encouraging combined transport.

In the assessment of the aid scheme concerned it was established that short sea shipping facilitates combined transport which has less negative effects on the environment than road transport. The CCA concluded that on such a basis State aid in the form of grants in this particular case constitutes compensation for the performance of short sea shipping services which would in the case of absence of such aid be obstructed in the performance of the particular tasks assigned to the undertaking concerned and as such qualifies for exemption under Article 4 paragraph 3 item e) of the State Aid Act. At the same time the aid scheme in

²³ Class: UP/I 430-01/2007-04/41, decision on authorisation of aid of 12 March 2008 (OG90/2008).

question fulfils the following conditions from paragraph 10 of Community guidelines on State aid to maritime transport (OJ C 013 , 17/01/2004):

- *the aid must not exceed three years in duration and its purpose must be to finance a shipping service connecting ports,*
- *the service must be of such a kind as to permit transport (of cargo essentially) by road to be carried out wholly or partly by sea, without diverting maritime transport in a way which is contrary to the common interest,*
- *the aid must be directed at implementing a detailed project with a pre-established environmental impact, concerning a new route or the upgrading of services on an existing one, associating several ship-owners if necessary, with no more than one project financed per line and with no renewal, extension or repetition of the project in question,*
- *the purpose of the aid must be to cover, either up to 30 % of the operational costs of the service in question, or to finance the purchase of trans-shipment equipment to supply the planned service, up to a level of 10 % in such investment,*
- *the aid to implement a project must be granted on the basis of transparent criteria applied in a non-discriminatory way to ship-owners. The aid should normally be granted for a project selected by the authorities,*
- *the service which is the subject of the project must be of a kind to be commercially viable after the period in which it is eligible for public funding,*
- *such aid must not be cumulated with public service compensation.*

In order to ensure transparency of costs and operations the aid beneficiary must keep separate accounts for its different activities

4.7.2 Notification of state aid to Zagrebački holding d.o.o., subsidiary Zagrebački električni tramvaj (ZET) – No aid (public transport)

In its assessment of the application made by the City of Zagreb concerning state aid for 2008 in the form of grants and capital injections for the subsidiary of the undertaking Zagrebački holding d.o.o. the CCA decided that the undertaking concerned – Zagrebački električni tramvaj (ZET) - provides (i) a service of a general economic interest, and (ii) the measure concerned does not constitute state aid given that aid represents no financial advantage to a firm and has no potential or actual effect on competition on the account of the fact that the access to the market covering the provision of public passenger transport services has not been liberalized, i.e. the public passenger transportation in the City of Zagreb has been exclusively entrusted to ZET.

The grants concerned in line with the application of the City of Zagreb had been planned for compensation for the price of tram tickets and settling the debt under long-term loans taken for the investment in fixed assets (new busses), new traffic surveillance and management system, new fare collection system, upgrading and reconstruction of the bus depot Trešnjevka, major maintenance of the existing tram fleet and purchase of a new fleet from domestic manufacturers etc. The total finances that will be granted by the City of Zagreb will not lead to overcompensation. In order to ensure transparency of costs and operations the aid beneficiary must keep separate accounts for its different activities.

4.7.3 Opinion on compatibility of the Act on Croatian Radio-Television with the State aid rules

The CCA gave its opinion on financing of the Croatian Radio-Television (HRT) through a license fee in the light of state aid rules applicable to public service broadcasting.

The CCA, based on the existing state aid rules and relevant decisions, decided that license fee contains State aid, notwithstanding the fact that license fee is not a direct expenditure of the State. However, it is a compulsory levy of every license user (radio and TV viewer) within the meaning of the Croatian Radio-Television Act (OG, 25/03). As a mandatory levy license fee may be compared here with a tax levy or contribution. This is in compliance with the decision of the European Commission in the Irish RTÉ and TG4 case, given that the measure in question constitutes a compulsory levy imposed by law and the revenues from the levy are under the control of the State.²⁴

The CCA held the view that in this particular case a selective economic advantage is given to HRT which other commercial operators in the market do not receive and which base their business operations exclusively on the revenues gained under the market conditions.

Consequently, the television license fee money used to finance public service broadcasting constitutes State aid, involves an economic advantage to the recipient – HRT – and therefore strengthens its position in the relevant market compared to other broadcasters which finance their activities based on commercial revenues only.

This is particularly relevant if we know that all broadcasting operators, public and private, try to increase viewer ratings with an objective to attract undertakings to advertise their products and services in particular programmes. This usually leads to spill-over effects of license fee revenues to the neighbouring markets. In practice it also means that a public service broadcaster, taking into account that

²⁴ Paragraphs 54 and 55 of the Commission's decision E 4/2005– Ireland – State aid financing of RTÉ and TNAG (TG4) of 27.02.2008, also available at http://ec.europa.eu/community_law/state_aids/comp-2005/e004-05.pdf

its license fee revenues can cut down the price of its advertising services, can offer a lower price of advertising space and time to undertakings than private operators who must cover all their costs exclusively through advertising revenues.

The existing Croatian Radio-Television Act provides for a definition that HRT must fulfil the requirements in respect of the interests of the public at the national and local level and maintain the appropriate balance of news, culture, education and entertainment programmes. However, in line with the Broadcasting Decision, the definitions provided by the Croatian Radio-Television Act need further clarifications. The entrustment of the undertaking and definition of public service remit must be precisely defined and clearly enumerated (as regards particular programmes, their duration, time of broadcast etc). Only such a formal entrustment clarified in advance can ensure a maximum degree of transparency of costs and compensation necessary for the discharge of public service obligations and enhance the ability of commercial operators to plan their own activities.

It is the conclusion of the Council that the Croatian Radio-Television Act and other legal acts must be aligned with the existing state aid rules in order to entrust clearly and precisely HRT with the service of general economic interest – discharge of public service obligation, where the scope of content and quantity of such services must be clearly defined in advance.

In compliance with the above mentioned decision in the Irish case, the CCA generally considers that the State financing of public service broadcasters is liable to distort competition and affect trade between Member States given the international trade in programmes and programme rights, the cross-border effects of advertising and because the ownership structure of private competitors may extend over several Member States. Negative effects on competition may occur where a public service broadcaster who is financed through license fee or any other form of State aid would engage in commercial activities at the national and international level such as, for example, advertising sale, attracting sponsorships, the sale and acquisition of program rights and online services.

4.8. Monitoring of State aid

In line with Article 15 paragraphs 2 and 3 of the State Aid Act the Agency monitors the implementation of authorised state aid *ex officio* or upon the proposal of aid beneficiaries, aid providers and any legal or natural person having a legal interest. Where the Agency establishes any irregularities in monitoring the implementation of state aid, it adopts a decision ordering the aid provider and/or aid beneficiary to remedy the irregularities in question. Where the aid provider and/or aid beneficiary does not remedy the irregularities in question, the Agency orders the aid provider and/or aid beneficiary recovery of the awarded state aid in the part in which irregularities have

been established, increased by statutory interest on arrears payable from the date on which the established irregularities occurred.

In 2008 the CCA carried out monitoring proceedings in three cases of granted aid which had been initiated *ex officio* in 2007: the monitoring proceeding relating to state aid granted for restructuring of the undertaking Slavonija IMK d.d. Osijek, the *ex post* approval proceeding relating to state aid granted to the undertaking Rockwool d.d. from Potpićan which has not been closed yet, and the *ex post* approval proceeding relating to state aid granted to the undertaking Croatia Airlines in 2005 and 2006 which was closed in 2009.

In the report period the CCA also took two decisions on the implementation of monitoring of state aid which had been granted to the textiles and leather industry and automotive parts manufacturers.

4.9. Reference and discount rates

Within the framework of the Community control of State aid, the Commission makes use of reference and discount rates. The reference and discount rates are applied as a proxy for the market rate and to measure the grant equivalent of aid, in particular when it is disbursed in several instalments and to calculate the aid element resulting from interest subsidy schemes.

Reference and discount rates are used to measure the grant equivalent of aid that is disbursed in several instalments and to calculate the aid element resulting from interest subsidy schemes. This system has three core functions: as indicator the reference rate serves as a threshold to determine whether loans should be classified as State aid or not, as discount rate the reference rate is mainly used to calculate the present values – net grant equivalent and in the calculation of recovery of aid granted unlawfully.

On 17 December 2008 the CCA adopted in line with the Decision on the publication of the rules relating to the method for setting the reference and discount rates (OG 114/2008) the base rate calculated on the basis of 1 year treasury bills interest rate of the Ministry of Finance recorded in September, October and November 2008 which was thereby set at 5.55 %. The reference rate is then topped by risk margin, depending on the rating of the undertaking concerned and the collateral offered, whereas the reference rate is also to be used as a discount rate, for calculating present values. To that end, in principle, the base rate increased by a fixed margin of 100 basis points is used. The reference rate will be revised during the year, if the average interest rate on treasury bills differs more than 15 % from the set rate.

Based on the government's Decision on the publication of the rules under the Temporary framework for State aid measures to support access to finance in the current financial and economic crisis (OG 56/2009) the CCA accordingly adjusted i.e.

decreased the previously set reference rate. Under the circumstances of the current financial and economic crises, this temporary state aid measure is to ensure access to finance, especially to aid providers such as the HBOR, to facilitate implementation of aid schemes containing aid in the form of subsidized interest rates. It must be noted that the reference and discount rates are applied as a proxy for the market rate and for calculating present values to measure the grant equivalent of aid where this base rate will be increased by a fixed margin depending on the rating of the undertaking concerned and the collateral offered.

Reference and discount rates

| Period | | Base rate | Discount rate | Reference rate under Temporary Framework |
|-----------|------------|-----------|---------------|--|
| From | To | | | |
| 1.10.2008 | 31.12.2008 | 5.55% | 6.55% | - |
| 1.7.2008 | 30.9.2008 | 6.01% | 7.01% | - |
| 1.4.2008 | 30.6.2008 | 6.01% | 7.01% | - |
| 1.1.2008 | 31.3.2008 | 6.01% | 7.01% | - |

5. INTERNATIONAL COOPERATION

5.1 European Union

During 2008, the Agency continued good cooperation with the European Commission's Directorate General for Competition, particularly in terms of drafting of the revised Competition Act, exchange of experience and implementation of technical support projects.

5.1.1 EU assistance projects

a) PHARE project in the area of competition and State aid

Twinning project with Germany was closed in its major part in November 2008. Only the implementation of two activities covering competition and State aid has been extended for three months – until the end of February 2009. The competition component involved the drafting of the revised Competition Act and training of the CCA staff, especially of the newly employed, training of the judges (in cooperation with the Judicial Academy), central and local administration, lawyers etc. Within the State aid component there were more seminars held at the local administration level and consultations were carried out particularly relating to the state aid cases linked to meeting the EU benchmarks (state aid for the shipbuilding and steel industry).

The project also involved the purchase of IT equipment and establishment of a data managing system which was in part financed from the CCA budget. It is planned that the new system will be put in use during 2009.

b) IPA project in the area of competition and State aid

IPA project worth EUR 2 million has been envisaged as an extension of the current PHARE project, to be implemented as a twinning project with a particular Member State and technical support provided by the independent consultants. The signing of the contract is planned for the last quarter of 2009.

With the view to preparing Croatia for the use of the funds under the IPA programme intensive training activities have been carried out in the CCA and all public administration authorities. What is more, the training course implemented in July 2008 introduced the concept of a "statement of assurance" which is made annually by a project leader and communicated to the National Fund and the European Commission. This statement verifies the readiness of any institution to use the assistance funds in line with the so called accreditation criteria. The first statement of assurance was made in July 2008.

In addition, all project implementation units have been subject to internal audit in September 2009. Given that no system of internal audit has been established in the CCA, the Ministry of the Economy, Labour and Entrepreneurship carried out audit services.

c) Other projects

In September 2008 the implementation of the PHARE project 2005 closed. The Project on State aid and market access in the Croatian maritime transport sector was implemented by the Ministry of the Sea, Transport and Infrastructure with the CCA as a co-beneficiary.

The CCA actively participates in the CARDS project of the Ministry of the Economy, Labour and Entrepreneurship aimed at informing of the Croatian business community on competition and State aid matters. In January and February two workshops were held whereas the CCA also participated in the drafting of a new guide on competition and State aid law including the cases from the everyday practice of the Agency.

Upon the request of the Ministry of the Economy, Labour and Entrepreneurship the CCA, as the observer institution, appointed a member of the expert working group and Sectoral Monitoring Committee for the implementation of the IPA project covering regional competitiveness.

5.2 Multilateral and bilateral cooperation

In 2008 the CCA was particularly active in the activities of the International Competition Network (ICN). It also signed agreements on cooperation with the competition authorities from Hungary, Austria and Bulgaria.

5.2.1 Multilateral cooperation

a) ICN

In the first part of 2008 the Agency participated in the ICN project relating to unilateral conduct by dominant firms, the main area of competition law that it has thus far not addressed. At the seventh annual International Competition Network (ICN) conference in Kyoto, Japan, the ICN adopted new Recommended Practices to improve assessment of unilateral conduct and merger analysis (among others also concentrated on abuse of superior bargaining position of undertakings holding a dominant position).

The Agency actively participated in the work of several working groups:

1. A separate working group for mergers sent its request for the provision of the data under the *Questionnaire about Recommended Practice in Merger*

Notification and Procedures for Croatia. The so called *Merger Template* was also updated.

2. Technical assistance subgroup of the Working group for the promotion of competition policy held two teleconferences, one on 4 June 2008, defining the work of the working group and future agenda, and 17 September 2008 on abuse of a dominant position by undertakings. The last teleconferences were held on 12 November 2008, on competition advocacy, and on 17 December 2008.
3. The activities of the Working group for the promotion of competition law and policy covered two projects: Review and update project (teleconference on 4 September 2008) and Market Studies Project.
4. Assistance system subgroup for competition authorities whose task is to set up liaison agencies that would themselves assist other competition authorities. Two teleconferences were held, on 9 October and 2 December 2008 on the subject, whereas competition authorities from Bulgaria, Japan, Jordan, Germany, Russia, Great Britain, USA and the DG for Competition of the European Commission applied for the position of liaison agencies. The CCA participated in all above mentioned teleconferences.
5. The ICN Cartel Workshop took place in Lisbon from 28th to 30th October, 2008. "How to Crack a Cartel in Three Days" at the 2008 ICN Cartel Workshop was visited also by the representatives from the CCA. They also established cooperation with the representatives from Canada and Ireland. It was agreed for the CCA to be included in the Cartel Working Group which is co-presided by Canada and the USA. At the occasion the CCA was invited to participate as one of the speakers or moderators at the following ICN Cartel Workshop to be held in Cairo, Egypt in October 2009.

b) UNCTAD

As a preparation for the meeting of the Intergovernmental Group of Experts on Competition Law and Policy in July 2008 in Geneva questionnaires had been answered and data updated covering the matters such as the attribution of competence between community and national competition authorities, independence and accountability of competition authorities, interface between competition policy and IPRs and abuse of a dominant position.

5.2.2 Bilateral cooperation

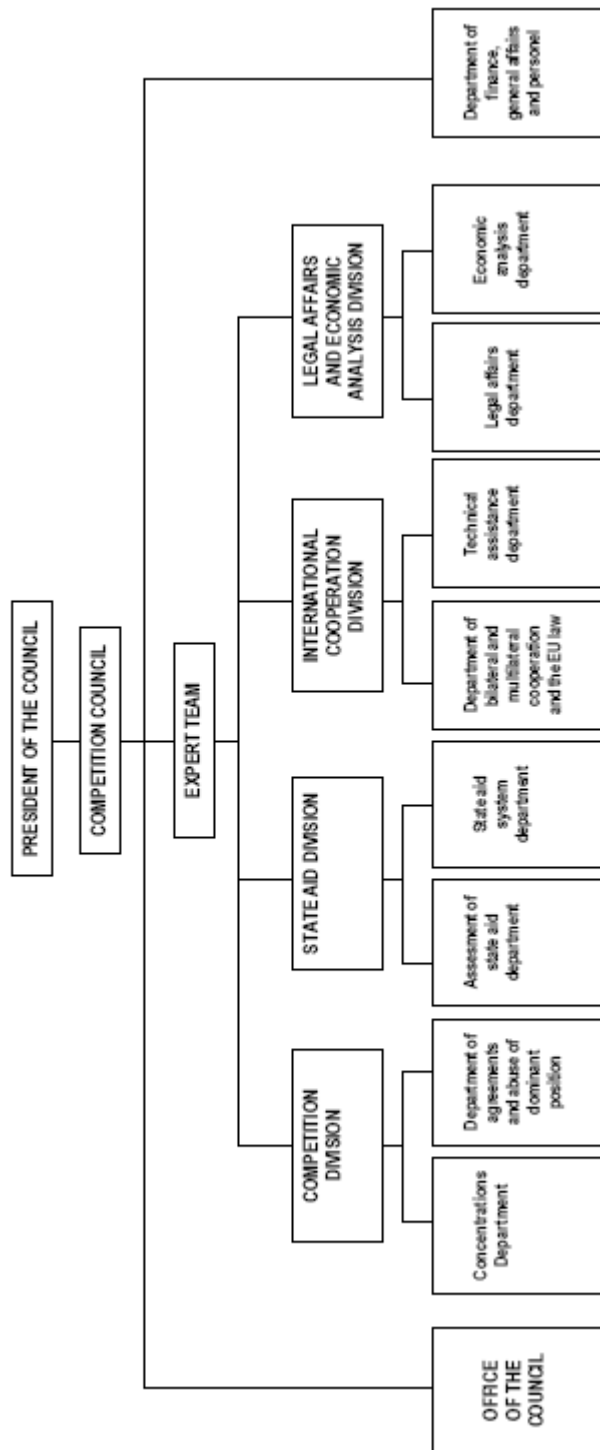
The representatives of the CCA were invited by the Bulgarian Commission for Protection of Competition to the Round Table of Competition Authorities of the SEE the European Perspective members which was held in Sofia on 29 May 2008. On the margins of the Round Table the Agreement on Cooperation between the CCA and the Bulgarian Commission was signed.

Upon the invitation of the Austrian Federal Competition Authority the president of the Croatian Competition Council and one representative of the CCA participated in the

workshop in Marchfeld near Vienna in June 2008 – *Competition Forum summer talks on competition*. At the margins of the workshop the representatives of the participating national competition authorities from Austria, Bulgaria, Croatia, Estonia, Lithuania, Latvia, Hungary, Romania, Slovenia and Switzerland signed a joint declaration (Marchfeld Declaration) on further cooperation in the promotion of effective implementation of competition law and policy. At the same time, Vienna was the city to host a bilateral meeting with the president of the Austrian Federal Competition Authority and the conclusion of the Cooperation Agreement between the Austrian and Croatian competition authorities.

On the basis of the bilateral agreement which has already been implemented by the CCA and the Romanian Competition Council one representative of the CCA participated in the work of the opening seminar on economic analyses held in Bucharest.

6. Organisational chart of the Croatian Competition Agency



7. Total number of adopted decisions in the area of anti-trust and merger control 2005 – 2008

| Description | | Adopted decisions | | | |
|--|---|-------------------|------------|------------|------------|
| | | 2005 | 2006 | 2007 | 2008 |
| 1 | Restrictive agreements | 5 | 1 | 1 | 4 |
| 1.1. | Individual exemption | 1 | 1 | - | 1 |
| 1.2. | Negative clearance or rejection of complaint | - | - | - | 1 |
| 1.3. | Prohibited agreements | 4 | - | 1 | 2 |
| 1.3.1. | <i>Interim measures</i> | - | 18 | 1 | 1 |
| | - proposed measure accepted: | - | 18 | - | 1 |
| | - proposed measure rejected: | - | - | 1 | - |
| 2 | Abuse of dominance | 3 | 8 | 3 | 3 |
| 2.1. | Negative clearance or rejection of complaint | 2 | 1 | 1 | 1 |
| 2.2. | Decision establishing abuse of dominance | 1 | 4 | 2 | 2 |
| 2.3. | Termination of the proceeding by procedural order due to non-established abuse of dominance (in ex officio proceedings) | - | 3 | - | - |
| 2.3.1. | <i>Interim measures</i> | - | 1 | - | - |
| | - proposed measure accepted: | - | 1 | - | - |
| | - proposed measure rejected: | - | - | - | - |
| 3 | Mergers | 26 | 26 | 25 | 28 |
| 3.1. | Approvals (Phase I and II) | 26 | 26 | 25 | 28 |
| | - Phase I: | 23 | 24 | 23 | 27 |
| | - Phase II: | 1 | 2 | 1 | - |
| | Conditional approvals (Phase II) | 2 | - | 1 | 1 |
| 4 | Advocacy | 59 | 41 | 29 | 13 |
| 4.1. | Opinions on draft legislation | 9 | 13 | 12 | 8 |
| 4.2. | Other expert opinions | 50 | 28 | 17 | 5 |
| TOTAL OF SUBSTANTIVE DECISIONS (1 - 4): | | 93 | 76 | 58 | 48 |
| 5 | Other cases and files | 144 | 151 | 158 | 186 |
| 5.1. | Regulations, guides and guidelines adopted by the CCA | 3 | - | - | - |
| 5.2. | Administrative cases closed by procedural order on dismissal of the request due to lack of legal grounds or by procedural order on termination of the proceeding due to withdrawal of the request | 33 | 23 | 17 | 26 |
| 5.3. | Non-administrative cases (transfer of jurisdiction or files closed by administrative note) | 38 | 42 | 82 | 101 |
| 5.4. | Sector investigation proceedings (retail, electronic media, bus transportation, press distribution, telecommunications and other) | 17 | 11 | 8 | 6 |
| 5.5. | Statistical surveys, international projects and cooperation files (national and international) | 53 | 68 | 41 | 46 |
| 5.6. | Internal acts and publications (internal bylaws, catalogue of information etc.) | - | 7 | 10 | 7 |
| TOTAL ACTIVITIES 2005 - 2008 (1- 5): | | 237 | 227 | 216 | 234 |
| 6 | Sessions of the Competition Council | 21 | 22 | 20 | 25 |

Source: CCA

8. CCA IN 2008 - FACTS IN BRIEF

- 48 employees
 - 5 members of the Council
 - 22 lawyers
 - 20 economists
- 25 case handlers in the area of antitrust and merger control
- 10 case handlers in the area of State aid
- 330 total registered files
- 268 registered antitrust and merger control files
- 62 registered State aid files
- 307 total solved cases
- 234 total solved antitrust and merger cases
 - 11 decisions on restrictive agreements
 - 24 decisions on abuse of dominance
 - 32 decisions on compatibility of concentrations
 - 13 opinions on draft laws and upon request of a party
 - 7 CCA internal acts and publications
 - 46 statistical reports and international projects
 - 101 non-administrative proceedings (e.g. transfer of jurisdiction)
- 73 total solved State aid cases
 - 14 decisions on authorisation of state aid
 - 8 decisions on *de minimis* aid
 - 8 non-aid decisions
 - 2 decisions on incompatibility of aid
 - 1 procedural order on dismissal
 - 1 recovery decision
 - 9 procedural orders
 - 30 non-administrative files (responses to aid providers' requests)
- 4 rulings of the Administrative Court of the Republic of Croatia by which all decisions of the CCA were upheld
- 1 decision of the Constitutional Court by which the ruling of the Administrative Court was upheld
- 7 requests for initiation of minor offence proceedings
- 25 sessions of the Competition Council
- 249 items on the agenda