Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

14-Jan-2011

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/GF/WD(2011)9
Unclassified

Global Forum on Competition

ROUNDTABLE ON CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

Contribution from Croatia

-- Session I --

This contribution is submitted by Croatia under session I of the Global Forum on Competition to be held on 17 and 18 February 2011.

JT03295095

English - Or. English

ASPECTS OF INTERNATIONAL COOPERATION IN CROSS-BORDER MERGER CONTROL CASES: EXAMPLES FROM THE CROATIAN COMPETITION AGENCY

-- Croatia --

1. Introduction

1. A concept of a concentration in the newly reviewed Croatian Competition Law (2009), (hereinafter referred as the: Competition Act; CA), is defined in a way that a concentration between undertakings shall be deemed to arise where a change of control occurred, on a lasting basis, and if it results from: (1) a merger association of two or more independent undertakings or parts thereof; or (2) acquiring control or decisive influence of one or more undertakings over one or more other undertakings, or of one or more undertakings or a part of an undertaking, or parts of other undertakings, in particular by: (i) an acquisition of the majority of shares or share capital, or (ii) obtaining the majority of voting rights, or (iii) in any other way in compliance with the provisions of the Company Law of the Republic of Croatia and other legal prescriptions.[1]

2. The Law also establishes that a concentration of undertakings which would significantly impede effective competition in the market, in particular where such a concentration creates or strengthens a dominant position of the undertakings parties to the concentration shall be deemed incompatible with competition rules and therefore prohibited[2].

2. Rules applicable to merger control

3. An acquisition of control occurs through transfer of rights, based on contracts between undertakings, or by other means, by which one or more undertakings, either separately or jointly, taking into consideration all legal and factual circumstances, acquire the possibility to exercise decisive influence over one or more other undertakings on a lasting basis[3]. Furthermore, a concentration is constituted by a creation of a joint venture by two or more independent undertakings performing on a lasting basis all the functions of an autonomous economic entity, but a creation of a joint venture by two or more independent undertakings performing on a lasting basis all the functions of an autonomous economic entity which leads to the coordination of the competitive behavior of undertakings that remain independent thereby significantly impeding competition shall not be considered as a concentration and shall therefore be assessed as a agreement among undertakings. [4].

4. A concentration shall not be deemed to arise in following cases: (1) when credit institutions or other financial institutions or investment funds or insurance companies, the normal activities of which

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1 Author. Dr. Sc. Mirna Pavletic-Zupic, Member of the Croatian Competition Council. Art 15, Par. 1 of the Competition Act; CA.

2 Art. 16 of the CA.

3 Art. 15, Par. 2 of the CA.

4 Art. 15, Par 3 and 6 of the CA.

include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis (not longer than 12 months) securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behavior of that undertaking, whereas the 12 month period may be extended in cases where such institutions or companies can show that the disposal was not reasonably possible within the period set; (2) when the acquisition of shares or interest results from internal structural changes in either the controlled or controlling undertaking (such as merger, acquisition, transfer of legal title etc.); and (3) when the control is acquired by an office-holder or administration officer – relating to bankruptcy, liquidation or winding up – according to the Bankruptcy Law and the Companies Act of the Republic of Croatia[5].

3. The notion of obligatory notification

5. The Competition Law also prescribes the conditions that should be met in order to implement the rules for obligatory notification of a concentration, along with the turnover thresholds. Namely, in order to assess the compatibility of concentration, the parties to the concentration are obliged to notify any proposed concentration to the Competition Agency if the following criteria are cumulatively met:

- the total turnover (consolidated aggregate annual turnover) of all the undertakings - parties to the concentration, realized by the sale of goods and/or services in the global market, amounts to at least HRK 1 billion in the financial year preceding the concentration and in compliance with financial statements, where at least one of the parties to the concentration has its seat and/or subsidiary in the Republic of Croatia, and
- the total turnover of each of at least two parties to the concentration realized in the national market of the Republic of Croatia, amounts to at least HRK 100,000,000 in the financial year preceding the concentration and in compliance with financial statements[6].

6. In relation to the calculating of the parties' turnover it should be mentioned that in the cases where the concentration involves association or merger of a part or parts of one or more undertakings, irrespective of whether or not those parts are constituted as legal entities, the calculation of the shall only include the relevant turnover of the parts which are subject to the concentration.

7. However, two or more transactions which take place within a two-year-period shall be considered to constitute one concentration, arising on the day of the last transaction.[7] Finally, the turnover for banks and other financial institutions, including insurance companies and re-insurance organizations as parties to concentrations, is calculated on the basis of the total turnover from their normal business operations in the financial year preceding the concentration, in a way that for the banks and other institutions which provide financial services, after deduction of direct taxes related to them, the sum of the following points of income shall be taken: (i) income from interest rates and similar income; (ii) income from securities (i.e. shares and

5 Art. 15, Par 5. of the CA.

6 Art. 17, Par 1 of the CA; where the parties to the concentration are unable to deliver financial statements at the time of the notification of concentration, the last year for which the parties to the concentration have concluded their financial statements shall be taken as the relevant year in the assessment procedure; also the intra-group turnover realized by the sale of goods and/or services by undertakings within a group shall not be taken into account when calculating the total turnover referred to under the conditions prescribed in the Law.

7 Art. 17, Par. 4 and 5 of the CA.

other variable yield securities, interests in other economic entities, shares in affiliated economic entities); (iii) commissions receivable; (iv) net profit on financial operations; and (v) other operating income[8].

4. The criteria for pre-notification

8. The Law prescribes the obligation for the prior notification of concentration. Namely, any concentration between undertakings shall be pre-notified from the side of the parties to concentration, subject to the following criteria[9]: (i) in the case where control or decisive influence is acquired over a whole or parts of one or more undertakings by another undertaking, the prior notification of concentration shall be submitted by the controlling undertaking. In all other cases, all undertakings parties to the concentration shall agree on the submittal of one joint notification; and (ii) the prior notification of concentration shall be submitted to the Competition Agency for assessment before the implementation of the concentration in question, following the conclusion of the contract on the basis of which control or decisive influence has been acquired by the controlling undertaking, or following the publication of the invitation to tender[10].

9. When notifying the concentration the parties shall provide to the Competition Agency the following documentation: (i) the original or a certified copy of the document, or a certified translation, showing the legal grounds for the concentration if the original official text is not originally written in Croatian; (ii) annual financial statements of the parties to the concentration for the financial year preceding the concentration; and (iii) other documents and data necessary for the evaluation of a merger in question[11].

10. The notifying party shall state in the notification if it intends to submit the request for appraisal of concentration to another competent authority in charge of assessment of concentrations outside the territory of the Republic of Croatia. If the notifying party has already submitted such a request, it shall provide the Agency with the decision of the relevant body, where the relevant decision has already been adopted.

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8 Art. 18, Par. 1 and 2 of the CA; For insurance companies and companies that perform re-insurance activities, the value of gross premiums which includes amounts paid and received in relation to the insurance contracts issued by or on behalf of an insurance company, including also re-insurance premiums, after the deduction of taxes and parafiscal contributions charged by reference to amounts of individual premiums or in relation to total premium volume.

9 Art. 19 of the CA.

10 Namely, by way of derogation from this rule, the parties to the concentration may submit the prior notification of concentration to the Competition Agency even before the conclusion of the contract or publication of the invitation to tender, if they, *bona fide*, provide evidence of the proposed conclusion of the contract or announce the invitation to tender; furthermore, the implementation of a notified concentration shall be permitted only after the expiry of the time period of 30 days, namely after the receipt of the final decision of the Competition Agency on compatibility or conditional compatibility of concentration in question. Finally, the Competition Agency can in particularly justified cases, upon the request of a party to the concentration, permit the implementation of particular actions relating to the implementation of the notified concentration before the expiry of the time prescribed period of time, and in deciding on such, the Competition Agency would ordinarily take into account all circumstances of the relevant case, particularly the nature and gravity of the damages which might be posed on the parties to the concentration or on third parties, and the effects of the implementation of the concentration concerned on competition.

11 Art. 20 of the CA; Upon the request of the parties to the concentration, the Competition Agency may in particularly justified cases revoke the obligation as referred above, where it finds that the information in question is not necessary for the assessment of the concentration concerned.

11. The Law also allows for the submission of a short-form notification of the concentration, which is used for the purpose of notifying concentrations under a simplified procedure treatment.

12. Such a short-form notification and the so called simplified procedure may be used where, in particular, one of the following conditions apply: (i) none of the parties to the concentration is engaged in business activities in the same relevant product and geographic market (no horizontal overlap), or in a market which is upstream or downstream of a market in which another party to the concentration is engaged (no vertical relationship); (ii) two or more of the parties to the concentration are engaged in business activities in the same relevant product and geographic market (horizontal relationship), provided that their combined market share is less than 15 %, and/or when one or more of the parties to the concentration are engaged in business activities in a relevant product market which is upstream or downstream of a product market in which any party to the concentration is engaged (vertical relationship), provided that none of their individual or combined market shares at either level is 25 % or more; and (iii) a party to the concentration is to acquire sole control of an undertaking over which it already has joint control; or in the case where two or more undertakings acquire control over a joint venture, where the joint venture has no, or negligible, actual or foreseen activities within the Republic of Croatia[12].

5. The assessment of compatibility of mergers

13. In relation to the assessment of compatibility of a concentration, the Competition Agency would initiate a proceeding immediately upon the receipt of the complete documentation necessary for the notification, and in a course of a proceeding it should always take into account the effects on competition and possible limitations on market access, particularly where the proposed concentration creates or strengthens a dominant position of the undertakings concerned[13].

14. In conducting the proceeding on the assessment of a merger, the Agency can ask for any data and documents which it might find necessary for the establishment of the facts in the case, and the notifying party or the undertakings which are parties to the concentration may submit to the Agency any data and documents which they find relevant for the assessment of the concentration concerned because the burden of proof in terms of positive effects of the concentration lies on the undertakings concerned.

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12 Art. 20, Par. 4 and 5 of the CA; By way of derogation from obligations stated afore, the Competition Agency may require a full notification of a concentration to be made, in cases where it finds that there are substantial indications of significant impediment of effective competition by the concentration concerned and where consequently, no simplified procedure treatment is applicable; furthermore, the day on which the Competition Agency has received all the data and documents requested, shall be considered as the date of the receipt of the complete notification of a concentration, and the Competition Agency shall issue a receipt thereon to the notifying party.

13 Art. 21. of the CA; In the course of assessment of a concentration the Agency shall in particularly define as follows: (1) the structure of the relevant market, actual and potential future competitors in the relevant market within the territory of the Republic of Croatia or outside this territory, supply and demand structure in the relevant market and its trends, costs, risks, economic, legal and other barriers to entry to or withdrawal from the market; (2) the position in the market and the market share, economic and financial power of the undertakings in the relevant market, the level of competitiveness of the undertakings and possible changes in the business operations of the parties to the concentration and alternative sources of supply for the buyers resulting from the implementation of the concentration concerned; and (3) the effects of the concentration on other undertakings, and especially relating to the consumer benefit, such as: decrease in prices of goods and/or services, shorter distribution courses, lowering of transportation, distribution and other costs, specialization in production, technological innovation and other benefits directly deriving from the implementation of the concentration in question.

15. Then, following the receipt of a complete notification of concentration, the Agency would publish on its web site a request for information aimed at all interested parties who may respond to this request in writing, giving their opinions and submitting the data at their disposal relating to the concentration concerned which would then provide the Agency with better understanding of the players and the relevant markets concerned[14].

6. Decisions from the side of the Croatian Competition Agency

16. In relation to the ways of possible decisions which the Competition Agency is going to take after the proceeding, and within three months following the adoption of a procedural order on initiation of the proceedings, the Law distinguishes three categories of possible decisions: (1) a decision by which the concentration concerned is rendered compatible; or (2) a decision by which the concentration concerned is declared conditionally compatible, provided that certain measures are observed and conditions met, within the time limits set by the Agency; (3) or by which the concentration concerned is assessed incompatible and therefore prohibited[15].

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14 Art. 21, Par. 6 and 7 of the CA; The request for information particularly contains the following data: (i) business activities performed by the parties to the concentration in the territory of the Republic of Croatia; (ii) the markets in the Republic of Croatia that may be affected through the implementation of the concentration concerned; (iii) a request containing the invitation to all undertakings who operate in affected markets, undertakings who perform their activities on other markets in which the proposed concentration may have effects on competition (upstream, downstream, neighboring markets), associations of undertakings, associations of employers, consumers associations and other parties who are not parties to the proceedings or competing undertakings of the parties to the concentration, but who may be reasonably assumed to have knowledge on the relevant markets concerned, to submit their comments, standpoints and opinions on possible significant effects which the concentration in question may produce on their operation as well as possible appreciable effects of the concentration concerned on effective competition in the markets concerned, and (iv) the deadline for submittal of the relevant comments which may not be shorter than 8 or longer than 15 days; furthermore, should in the course of the assessment of a concentration, the Agency receive one or more new notifications of concentration where control or decisive influence is acquired by one and the same undertaking who submitted the original notification of a concentration, than the Agency may decide to conduct a joint assessment proceedings and take one decision if it finds it reasonable and efficient; in this case the time limit for the assessment of a concentration shall begin to run when the notifying party is issued the receipt confirming the complete notification of concentration which was last notified to the Agency.

15 Art. 22, Par. 7 of the CA; Where the Agency, on the basis of valid data and documents submitted together with the notification of a concentration, or on the basis of other available information and findings, establishes beyond dispute that it is reasonable to suppose that the implementation of the proposed concentration is not prohibited and unless it takes a procedural order on the initiation of the assessment proceedings within 30 days following the receipt of the complete notification of concentration, it can issue a special notice where would be confirmed that the subjected merger is deemed to be compatible with the market. Otherwise, where the Agency, based on the evidence submitted together with the notification of a proposed concentration, or on the basis of other available information and findings finds that the implementation of the concentration concerned could significantly impede effective competition in the relevant market, in particular as a result of the creation or strengthening of a dominant position of the undertakings concerned, it shall take a procedural order on the initiation of the proceedings for the assessment of compatibility of the concentration concerned. Finally, if in the course of the assessment proceedings the Agency finds that the concentration in question may be declared compatible only after necessary obligations and conditions are fulfilled, it shall without delay inform the notifying party thereof, and the notifying party shall than in the time period which may not exceed 30 days from the day of the receipt of this notice propose adequate commitments (whether behavioral and/or structural measures) and other conditions in order to remove the negative effects of the concentration concerned. It is important to mention that the commitments may be proposed by the notifying party as early as in the prior notification

17. However, the Agency may, ex officio or upon request of a party to the concentration, withdraw the decision on concentration in the following cases: (1) if the decision has been made on the basis of incorrect or false information that has been essential for the decision making; and/or (2) if any of the parties to the concentration have not fulfilled the conditions and obligations determined by the decision of the Agency.

18. Such decision on the basis of which the declaring the concentration was declared as conditionally compatible if being revoked, shall render the concentration incompatible and therefore prohibited within the meaning of the Law, and parallel set the conditions and obligations and deadlines to restore effective competition and impose the fine prescribed for the committed infringements[16].

19. As well, the Agency could, ex officio, or upon request of a party to the concentration, amend its decision where the parties to the concentration cannot fulfill any of the proposed conditions or observe the set deadlines, owing to unpredictable circumstances beyond their control.

20. Such an amended decision of the Agency may contain new obligations, conditions and deadlines for their implementation aimed at restoring effective competition. In other cases, the concentration could also be suspended. Namely, the Agency would, ex officio, by means of a separate decision, propose all necessary measures**,** whether behavioral or structural, aimed at restoring efficient competition in the relevant market, and set the deadlines for their adoption in the following cases: (i) where the concentration concerned has been implemented contrary to the decision of the Agency by which the concentration has been assessed as incompatible and therefore prohibited; (ii) or where the concentration concerned has been implemented without the obligatory prior notification of concentration based on the Law.

21. Following this, on the basis of a decision referred above, the Agency may, in particular: (1) order for the shares or interest acquired to be transferred or divested; (2) prohibit or restrict the exercise of voting rights related to the shares or interest in the undertakings parties to the concentration, and order the joint venture or any other form of control by which a prohibited concentration has been put into effect to be removed, whereas the decision may also contain the imposition of a fine prescribed for the committed infringements[17].

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of the concentration concerned, whereas the Agency may accept the measures – conditions, obligations and deadlines, proposed by the parties to the concentration, in their entirety or parts thereof, if it establishes that the measures concerned are adequate to restore efficient competition, however, in the event that the Agency does not accept or just partly accepts the said remedies proposed by the parties to the concentration, it can define and impose other behavioral and/or structural measures, conditions, obligations and deadlines for the restoration of effective competition in the market. The parties to the concentration may, as a rule, pursue the activities relating to the implementation of the concentration concerned as of the day of the receipt of the decision by the Agency declaring the concentration conditionally compatible; in the event that the parties to the concentration fail to comply with the conditions and obligations specified by the decision of the Agency within the prescribed time limits, the Agency would, taking into account the reasons for non-compliance regarding the conditions and obligations concerned, withdraw or amend the decision on the basis of which it rendered the concentration conditionally compatible with the market, whereas the time period established by the Law shall not run from the day of the receipt of the notice, to the day of the receipt of the proposed commitments in the Agency.

16 Art. 23 of the CA.

17 Art. 24 of the CA.

7. CCA's experience; Merger between *Merck & Co.* (USA) and *Sanofi – Aventis* (France)

22. The most recent case which was subject for the review from the side of the Croatian Competition Agency was the merger involving the entrepreneurs Merck & Co., Inc, One Merck Drive, Whitehouse Station, New Jersey, USA and Sanofi – Aventis S.A., 174 Avenue de France, Paris, France, which was brought on the 46 session of the Croatian Competition Council held on 15 July 2010.

23. The merger was in a form of a joint venture, which was established outside the territory of the Republic of Croatia, but the merger was reviewed because of its possible effects on the Croatian Market. The said concentration was cleared to be compatible with the Croatian market and no measures were imposed.