Abuse of dominance in the electronic communications markets: overview of Croatian efforts with a report on recent developments

by

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Abstract

On 6 November 2019, the Croatian Competition Agency brought one of its latest decisions concerning dominance abuse on Croatian electronic communication market. When asked to assess the behaviour of the dominant incumbent, Agency had to deal not only with incumbent's position in the electronic communications markets, but also with spillover of its power to electronic media market. In its ruling, the Agency concluded that exclusivity licencing terms regarding premium football content do not qualify as the abuse of dominant position. While the decision in itself might represent only an interesting read, if considered in the context of Agency's previous practice, powers and influence of other Croatian regulatory authorities, it might also represent the long-awaited evidence of the need to shift perspective and invoke improved rules for antitrust cases concerning electronic communication operators in Croatia.

Résumé

Le 6 novembre 2019, l'Agence croate de la concurrence a rendu une de ses dernières décisions concernant l'abus de position dominante sur le marché croate des communications électroniques. L'Agence a dû se prononcer non seulement sur la position de l'opérateur dominant sur les marchés des communications électroniques, mais aussi sur les répercussions de son pouvoir sur le marché des médias électroniques. Dans sa décision, l'agence a conclu que les conditions des licences d'exclusivité concernant les contenus premium de football ne constituent pas un abus de position dominante. Bien que la décision en elle-même ne représente qu'une lecture intéressante, si elle est considérée dans le contexte de la pratique antérieure de l'Agence, des pouvoirs et de l'influence d'autres autorités de régulation croates, elle pourrait également représenter la preuve tant attendue de la nécessité de changer de perspective et d'invoquer des règles renforcées pour les affaires d'antitrust concernant les opérateurs de communications électroniques en Croatie.

Key words: The Croatian Competition Agency; electronic communication operator; abuse of dominance; broadcasting rights; premium TV content; pay-TV.

JEL: K21

I. Introduction

> 'Regulation and competition policy are very close relatives. As you probably all know relationships between close relatives can be quite complicated.'
> (Kroes, 2009, p. 2)

Barely any economic sector is as affected by modern competition law as electronic communications. We can compare electronic communications to the paved road which digitalization and online markets walk on, or an invisible hand which still rocks the cradle from which the laughter of innovation is always heard, albeit with a few screams. As electronic communications operators constantly interact with millions of consumers, practically each citizen, they are naturally in a position where regulators give them special attention.

The long-awaited liberalization of electronic communications in the Republic of Croatia started in 1999, with the entrance of a new mobile communications provider. However, first major shifts did not occur for several years, as the foundations for the introduction of the first alternative fixed electronic communications providers were established only in 2004. Liberalization immediately brought more active operators and a diverse offer, which induced an overall rise of the market's value. By the end of 2005, Croatia already had three mobile operators spread between 3 million users, while 14 undertakings[1] had been granted licenses for the provision of services in the fixed network and were to begin competing for 1.7 million users. Higher number of competitors and users expected swift benefits from the dynamic developments in the times to come.

New competitors immediately tried to gain as much manoeuvring space as possible – seeking the strict regulation and supervision of the incumbent[2] – and thus it was logical that the Croatian Competition Agency[3], along with HAKOM[4], the electronic communications sector regulator, became prominent stakeholders in the developing market.

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[1] European Commission (2005). Croatia 2005 Progress Report. Brussels: European Commission https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/archives/pdf/key_documents/2005/package/sec_1424_final_progress_report_hr_en.pdf.

[2] Term 'incumbent' is used througout the text with the same meaning, describing the undertaking Hrvatski Telekom d.d., a subsidiary of Deutsche Telekom AG, that was the monopolist before the liberalisation of the electronic communications services, and which remained the biggest operator on the Croatian market. In the text for the undertaking we also use widelly accepted abbreviation '**HT**'.

[3] In Croatian: Agencija za zaštitu tržišnog natjecanja.

[4] Abbreviated name of the Croatian sector regulator 'Hrvatska regulatorna agencija za mrežne djelatnosti', in English the 'Croatian Regulatory Authority for Network Industries'.

II. Early steps of the Croatian Competition Agency in the electronic communications sector

Shortly after the appearance of the first alternative operators on the market, the Croatian Competition Agency started receiving its first complaints on the behaviour of the incumbent.

Unsurprisingly, during the next two years, in the period from 2005 to 2007, all of the complaints received related to abuse of a dominant position, more precisely to possible pricing abuses. In principle, a dominant undertaking on one of the relevant markets in the electronic communications sector can abuse its market power in various ways. Firstly, the operator's action may restrict the activities of its competitors by, for example, denying competitor access to critical infrastructure (Bellamy and Child, 2009, p. 1511). Secondly, the operator can extend its dominant position to areas in which it is not yet dominant by, for example, tying products or services (tying, bundling) or by means of using its dominant position in one market to squeeze competitors from a neighbouring market (margin squeeze) (Pecotić Kaufman, 2011). Thirdly, the operator may impose prices which customers would not accept in conditions of effective competition and, fourthly, the operator may impose the conditions which suppliers would not have approved had it not been for the customer-operator in a dominant position (Pecotić Kaufman, 2011).

Taking a closer look at these published cases, it seems that – pursuant to the complainants – different offers of the incumbent, related to fixed and mobile retail voice services, put competitors at a disadvantage and prevented them from effectively competing. However, the Croatian Competition Agency rejected all these applications, declaring its lack of competence. As a rule, it was concluded that *ex-ante* involvement[5] of the HAKOM led to the exclusion of competition law rules. Thus, all cases were referred to the HAKOM for further resolution.

On the other hand, in the mentioned period, the Croatian Competition Agency did not initiate any procedure *ex-officio*. So, although the number of competition cases in this period is not large, it is stable in terms of relevant markets involved and case outcomes.

HAKOM was officially established on 1 July 2008 by merging the Croatian Telecommunications Agency and the Postal Services Council. However, this date is not related to the commencement of the work of the national regulator for electronic communications, since the commencement of HAKOM's work has to be associated with the establishment of the Croatian Telecommunications Institute from which HAKOM emerged and which officially began operations as early as on 1 January 2000.

[5] Relating to the regulation of the incumbent's offer to consumers i.e. prices.

However, as early as 2007, the Croatian Competition Agency took the first major step forward by issuing a decision[6] where it established an abuse of a dominant position in the electronic communications markets. It found that linking different electronic communications services in the offers directed at business users (tying), as a package, led to the abuse of a dominant position by the incumbent in the fixed and mobile retail voice services markets. The Croatian Competition Agency determined that no undertaking other than the incumbent is active in (all) relevant markets and cannot offer a similar (full) package of services to its key customers. On the other side of the same coin, key customers cannot switch their demand to any other provider by taking such packaged services. Therefore, it was concluded that the incumbent exploited its market power and benefited from comparative advantages achieved on those markets. *Obiter dictum*, the Croatian Competition Agency noted that it shares competences with the HAKOM in electronic communications markets; however, it did not delineate the task of each authority and the goals of these neighbouring, yet separate, regulations and legal fields. Therefore, in order to avoid a possible positive conflict of jurisdictions, in the first abuse of dominance case relating to electronic communications, the Croatian Competition Agency did not assess relevant discounts and other price-related elements from the perspective of competition law, as the HAKOM already passed an *ex-ante* decision on these matters. The Croatian Competition Agency believed, in our view erroneously, that any *ex-ante* intervention prevents the application of (*ex-post*) competition law rules irrespective of the established effects.

Shortly after, in 2008, the Croatian Competition Agency established another infringement. However, this time, it was not relating to the abuse of a dominant position, but to dubious vertical agreements that the rival of the incumbent[7] had concluded with its distributors in relation to the mobile market. By way of the decision[8], the Croatian Competition Agency annulled illicit provisions in parts where they established minimum rebates for further resale and imposed qualitative criteria on the distributor's retail locations (Svetlicinii, 2008). Via these prohibited (vertical) agreements, the supplier imposed additional obligations on the distributors, which are not related to the subject matter of those agreements, within the meaning of Article 9 of the

[6] Decision of 12 July 2007, No. UP/I 030-02/2005-01/50.

[7] Term 'rival of the incumbent' or 'incumbent's biggest rival' is used througout the text with the same meaning, describing the undertaking A1 Hrvatska d.o.o., a subsidiary of A1 Telekom Austria Group AG, which, after the liberalisation of electronic communications services, represents the biggest rival of the incumbent on the relevant market.

[8] Decision of 30 December 2008, No. UP/I 030-02/06-01/18.

Croatian Competition Act.[9] These obligations relate to criteria or conditions which must be fulfilled by the store (point of sale) and the obligations with respect to the marketing activity of the distributor. The Croatian Competition Agency determined that such obligations are characteristic for selective distribution systems, which did not exist in this case.

III. Series of 'missed opportunities'

Even though the number of processed cases increased, the years that followed were not so fruitful in terms of adjudicated matters. By 2019, the Croatian Competition Agency dealt with fifteen antitrust cases related to the electronic communications markets[10]. These cases were predominantly the result of initiatives filed against the incumbent alleging its abuse of a dominant position.

More precisely, nine of the respective initiatives concerned the market behaviour of the incumbent, while the remaining four concerned the market behaviour of the incumbent's biggest rival. In short, the initiatives contained the following allegations:

- abuse of a dominant position by way of excessive pricing for infrastructure access services and by way of predatory pricing practices in the IPTV (paytv) services market (incumbent)[11];

[9] Croatian Competition Act (Zakon o zaštiti tržišnog natjecanja; Official Gazette, nos. 79/09 and 80/13), currently Article 8, which mirrors Article 101 and of the Treaty on the Functioning of the European Union (formerly Article 81 and/or 82 of the EC Treaty).

[10] Decision of 31 August 2010, No. UP/I 030-02/2008-01/45 (B.net Hrvatska d.o.o. vs. incumbent); Decision of 3 November 2011, No. UP/I 030-02/11-01/33 (VOX MUNDI d.o.o. vs. incumbent); Decision of 15 November 2011, No. UP/I 030-02/2009-01/034 (OT-Optima Telekom d.d. vs. incumbent); Decision of 17 November 2011, No. UP/I 030-02/2010-01/002 (Akton d.o.o. vs. incumbent's biggest rival); Decision of 9 February 2012, No. UP/I 030-02/10-01/007 (HAKOM vs. incumbent); Decision of 26 July 2012, No. UP/I 030-02/2010-01/001 (AZTN ex officio vs. incumbent and incumbent's biggest rival); Decision of 19 September 2013, No. UP/I 034-03/2013-01/023 (Davidias nekretnine d.o.o. vs. incumbent's biggest rival); Decision of 8 May 2014, No. UP/I 034-03/2013-01/007 (H1 TELEKOM d.d. vs. incumbent); Decision of 2 December 2015, No. UP/I 034-03/15-01/027 (Infrastruktura d.o.o. vs. incumbent); Decision of 15 September 2016, No. UP/I 034-03/16-01/006 (Anonymous initiator vs. incumbent); Decision of 7 May 2018, No. UP/I 034-03/17-01/024 (Magic Net d.o.o. vs. incumbent's biggest rival); Decision of 3 July 2018, No. UP/I 034-03/18-01/001 (Anonymous initiator vs. incumbent and incumbent's biggest rival); Decision of 14 November 2018, No. UP/I 034-03/2013-01/007 (H1 TELEKOM d.d. vs. incumbent); Decision of 6 November 2019, No. UP/I 034-03/12-01/023 (AZTN ex officio vs. incumbent); Decision of 11 December 2019, No. UP/I 034-03/19-01/010 (Totalna televizija d.o.o. vs. incumbent's biggest rival).

[11] Decision of 31 August 2010, No. UP/I 030-02/2008-01/45.

- abuse of dominance by way of manipulating the termination and amendment conditions of agreements (incumbent)[12];
- abuse of dominance by way of unlawful price reductions and possible predatory pricing during several promotional campaigns (incumbent)[13];
- abuse of dominance by way of refusal to supply and refusal to conclude infrastructure agreement practices, which precluded the competing undertaking from entering the relevant market (incumbent's biggest rival)[14];
- abuse of dominance by way of margin squeeze in the downstream market (incumbent)[15];
- applications of different conditions for the service 'Hrvatski memo', which is provided via short codes – numbers (incumbent's biggest rival)[16];
- abuse of a dominant position by way of a manipulation of the user database pertaining to a smaller rival on the market – made available to the incumbent for the purpose of upstream services which incumbent provides to its rival – and by way of deficient services provision on the upstream market (incumbent)[17];
- abuse of dominance due to non-compliance with compensation terms of an agreement concluded with incumbent (incumbent)[18];
- abuse of a dominant position by way of tying practices, that is, the price for internet or mobile services combined with fixed telephone services is lower than the price for either internet or mobile services without fixed telephone services – also, the quality of either service is better when purchased together with fixed telephone services (incumbent)[19];
- abuse of a dominant position by way of predatory pricing practices aimed at the exclusion of competition – initiator states that such practices concerned the territory of the City of Varaždin and Varaždin county and aimed directly at a small local telecom operator (incumbent's biggest rival)[20];
- abuse of a dominant position by way of discriminatory pricing practices whereby the incumbent's related company Iskon had received better pricing conditions than its competitors – alternative operators (incumbent)[21];

[12] Decision of 3 November 2011, No. UP/I 030-02/11-01/33.
[13] Decision of 15 November 2011, No. UP/I 030-02/2009-01/034.
[14] Decision of 17 November 2011, No. UP/I 030-02/2010-01/002.
[15] Decision of 9 February 2012, No. UP/I 030-02/10-01/007.
[16] Decision of 19 September 2013, No. UP/I 034-03/2013-01/023.
[17] Decision of 8 May 2014, No. UP/I 034-03/2013-01/007.
[18] Decision of 2 December 2015, No. UP/I 034-03/15-01/027.
[19] Decision of 15 September 2016, No. UP/I 034-03/16-01/006.
[20] Decision of 7 May 2018, No. UP/I 034-03/17-01/024.
[21] Decision of 14 November 2018, No. UP/I 034-03/2013-01/007.

- abuse of a dominant position on the premium football TV content distribution market due to exclusivity terms for the territory of the Republic of Croatia, that is, exclusive distribution rights for premium content which the incumbent had acquired by means of the agreement concluded with HD-WIN d.o.o. and HD-WIN Arena sport d.o.o. (incumbent)[22];
- abuse of a joint dominant position on the part of the incumbent's biggest rival by way of non-pricing practices on the upstream market (refusal to supply and vexatious litigation) which are intended to exclude its competitor – Totalna televizija d.o.o. – from the relevant downstream market (incumbent's biggest rival)[23].

Interestingly, the Croatian Competition Agency was predominantly dismissing the respective initiatives claiming the lack of requirements for initiating a procedure. By doing so the Agency – intentionally or not – missed the opportunity to dig deeper into every case, analyse all the evidences the situation might have had to offer (apart from initial ones) and confront parties to the procedure during oral hearings.

It must be noted that the bar for initiating a procedure from the statutory provisions' angle – that is, procedural requirements – is set fairly low. Namely, a dominance abuse procedure should be initiated if the received initiative contains the following: (1) name and seat of the legal entity, that is, the name and surname and the residence of the natural person filing the initiative, (2) information by means of which it can be unequivocally and clearly determined against whom the initiative is filed, (3) description of the facts; practices or circumstances qualifying as the reason for submitting the initiative, and (4) documents and other evidence available to the applicant which support its (his/her) allegations[24].

In that respect, one could justifiably form the following questions: was it really the case that nine out of the thirteen initiatives qualified for a dismissal, or did the Agency make a mistake in at least some of them by not taking the procedure further? Were at least some of these cases missed opportunities for the creation of a more transparent electronic communications market or, from the competition law perspective: could the body of case law have been more robust? There is no question that this approach of the Croatian Competition Agency is lawful; after all, it has been confirmed by the courts.

Namely, the Croatian Competition Agency has created a two-tiered system, in a procedural sense, where administrative proceedings are initiated only when it is (almost) certain that a violation of the law has occurred and that it

[22] Decision of 6 November 2019, No. UP/I 034-03/12-01/023.
[23] Decision of 11 December 2019, No. UP/I 034-03/19-01/010.
[24] Article 37 paragraph 2 of the Croatian Competition Act.

can be determined. Otherwise, the Croatian Competition Agency conducts an investigation and analysis – which is the metonymy for not only gathering of facts and evidences, but also for making legal judgments – but still does not initiate the procedure.

This is, from our point of view, a problematic practice, especially in the cases concerning abuses of a dominant position. The party that has been investigated has a very narrow window to invoke its 'rights of defence'. Further, abuse of a dominant position usually encompasses practices with undertakings that have confronted (economic and legal) interests. Also, more often than not, the authority should rely on complex economic analyses in such cases and carry significant data collection activities, while it does not benefit from any self-restraint in this regard. It is logical for the authority to take a procedural path that allows greater power, that is, in the Croatian case, to formally open a procedure. However, the Croatian Competition Agency was not keen to engage itself in formal proceedings – whereby it gave away delicate process tools – and this resulted in the end of proceedings at an early stage.

Interestingly, two cases were also handled to examine potential cartel collusion between electronic communications operators, but both were dismissed for lack of evidence. In the same period, the market went through consolidation, which was evidenced by a total of eight merger cases[25].

IV. Cooperation with the Croatian Regulatory Authority for Network Industries (HAKOM)

HAKOM promotes competition in the sector of electronic communications networks and services, as well as electronic communications infrastructure and related equipment. While electronic communications regulations are mainly meant to safeguarding recently achieved levels of competition in the post-liberalization period by *ex-ante* infringement prevention – where HAKOM is authorized to interpret and implement sector specific rules – competition rules are tailored to safeguard competition via *ex-post* control.

Electronic communications regulations implement competition law standards in the phase of the identification of markets susceptible to *ex-ante* regulation (e.g. the three criteria test includes the understanding of the potential applicability

[25] Decision of 14 May 2010, No. UP/I 030-02/2010-02/05; Decision of 28 July 2011, No. UP/I 030-02/2011-02/005; Decision of 19 March 2014, No. UP/I 034-03/2013-02/007; Decision of 22 May 2014, No. UP/I 034-03/14-02/002; Decision of 7 August 2014, No. UP/I 034-03/14-02/005; Decision of 26 January 2017, No. UP/I 034-03/16-02/009; Decision of 12 July 2018, No. UP/I 034-03/18-02/007; Decision of 4 March 2019, No. UP/I 034-03/18-01/014.

of competition law rules), starting with market definition and analysis, which may result in the designation of operators with significant market power and the imposition of regulatory obligations onto such operators. In the context of the electronic communications regulations term "significant market power" (SMP) is used, which is equated in a meaning with the concept of a dominant position under the competition law (Pecotić Kaufman, 2011). There is no effective competition in electronic communications markets where there are one or more undertakings with significant market power in specific market. In essence, effective competition and the lack of significant market power are two sides of the same coin (Koenig, Bartosch, Braun and Romes, 2009).

In all phases, HAKOM, where necessary, cooperates with the Croatian Competition Agency, either by seeking its opinions or proposing the initiation of competition infringement proceedings in cases where HAKOM has identified a potential infringement of competition law rules.

Also, in abuse of dominance and cartel cases relating to electronic communication services or networks, the Croatian Competition Agency cooperates closely with HAKOM. In practically all cases which reached the assessment phase between 2005 and 2019 and involving electronic communications, the Croatian Competition Agency contacted HAKOM and relied on its findings and expert standpoints. This cooperation is voluntary and typically encompasses technical assistance during (i) the process of defining relevant markets and delineations between related relevant products, (ii) gathering of relevant data, for example: revenues, number of customers, (iii) assessing market shares and, (iv) evidencing effects of certain behaviours or agreements.

Cooperation is also significant during the merger review process. Like its EU counterpart, the Croatian merger control regime catches three types of transactions (i) the merger of independent undertakings or parts thereof, (ii) the acquisition of control and (iii) the creation of a full-function joint venture. Besides the merger control rules laid down in the Croatian Competition Act, merger rules for particular sectors also exist. In cases of mergers affecting the electronic communications sector, the Croatian Competition Agency is obliged to request an expert opinion from HAKOM regarding the possible effects of the merger on the relevant market.[26] In that regard, when the Croatian Competition Agency in 2014 adopted a landmark merger decision[27] whereby it conditionally cleared HT's acquisition of control over OT – Optima Telekom d.d. – a close rival in fixed network services – HAKOM delivered more than a dozen opinions to the Croatian Competition

[26] This obligation is stemming from Article 68. para. 3 of the Electronic Communications Act (Official Gazette, nos. 73/08, 90/11, 133/12, 80/13, 71/14 and 72/17).

[27] Decision of 19 March 2014, No. UP/I 034-03/2013-02/007.

Agency and provided professional assistance in accessing and testing the proposed commitments.

Electronic communications operators with significant market power[28] and operators granted a licence for the use of the radio frequency spectrum at state level, who would not be subject to merger control rules under the Croatian Competition Act[29], must notify HAKOM of each intention to merge as well as any intention of any other form of joint or concerted practice, irrespective of the conditions determined under the Croatian Competition Act.

HAKOM was granted with such authority in 2008 to safeguard competition on the still nascent telecommunications market. Namely, turnover thresholds prescribed by the Croatian Competition Act are quite high – at least in relation to neighbouring countries – which allowed large telecommunications operators to acquire smaller telecommunications operators without merger control. Such 'legal gap' enabled, in 2006, HT to acquire Iskon, the then largest alternative internet provider, thereby gaining almost 100% of the broadband market. The Director of the Croatian Agency for Telecommunications (*Hrvatska agencija za telekomunikacije*) publicly voiced his concerns about the concentration because of the strengthening of HT's monopoly status. We may assume that the acquisition of Iskon by HT would not have been approved, and that the telecommunications market would have been much less concentrated, if the regulator had the authority to review concentrations on the telecommunications market at the time, irrespective of the turnover thresholds.

HAKOM's competence to review mergers falling outside the competence of the Croatian Competition Agency was not regulated to a sufficiently detailed level. For instance, it was not precisely regulated which regime should be used for a merger review conducted by HAKOM – competition law or sector specific rules. If the competition law regime is used, is it then opportune for HAKOM to conduct a merger review, as it misses the procedural framework for assessing such cases and is possibly not well equipped to do so? By contrast, if sector specific rules are used, are those rules sufficient to process merger cases? These questions have finally been resolved in 2019 during a merger case[30] before HAKOM between HT and its competitor providing pay-TV services, HP Produkcija d.o.o. In this context, HAKOM bravely declared that it has full competence to review all merger cases between electronic communications operators with significant market power and operators with the licence for the use of the radio frequency spectrum at state level, who are not subject to

[28] In our view, in practice this means that all telecommunications operators in the market are included, due to their significant market position in the market for traffic termination in their own networks.

[29] If, e.g., they do not meet the prescribed turnover thresholds.

[30] Case No. UP/I-344-01/18-08/02.

merger control under the Croatian Competition Act. In HAKOM's view, this included not only the power to clear such mergers but also to block them or to impose measures under which a conditional clearance may be issued. In the review process, HAKOM relied on domestic competition law rules and on the EC Merger Regulation, at least, in their essential meaning.

By virtue of this precedent, which was not challenged before the courts, we may arrive to the conclusion that Croatia has a two-tier merger control system with respect to electronic communications, i.e. the system where HAKOM is a competent merger review authority if the merger falls below the threshold radar of the Croatian Competition Agency.

V. Cooperation with the Electronic Media Agency[31]

So far, the cooperation between the Croatian Competition Agency and the Electronic Media Agency was not as extensive as with HAKOM, however, a change in this trend can be expected. The entire electronic communications industry has adopted a broader strategy. After a long and peaceful period when electronic communication operators were offering traditional services and were not under pressure from new business models, the smartphone revolution started and caused the consequent explosion of data traffic in mobile and fixed networks, spurred with the appearance of OTT (Over The Top) players in the voice and messaging world (Skype, Viber, WhatsApp, etc.) (Jurjević, 2018).

It is long since it became typical for electronic communications operators to include pay-TV services into its offer towards customers, but they also became ready for the new move: premium content (e.g. sports) or even acquiring broadcasters themselves and different electronic publications, which became targets in the new landscape. The fight amongst electronic communications operators has therefore partly shifted to the area of content, the business area previously largely reserved for broadcasters and media companies.

Croatia in this respect tends to catch all media mergers, as mergers in the media sector must be notified to the Croatian Competition Agency, irrespective of the turnover thresholds, provided that – as recent case-law suggests – at least two of the undertakings concerned are considered 'publishers' under the Croatian Media Act.[32] This is a rather new practice since the 2019

[31] In Croatian: Agencija za elektroničke medije.

[32] Croatian Media Act (Zakon o medijima; Official Gazette, nos. 59/2004, 84/2011 and 81/2013).

decision[33] concerning gun-jumping in relation to the acquisition of a 100% share in a TV publisher.

Before that, the Croatian Competition Agency's interpretation of the Croatian Media Act was that any merger including at least one publisher is a notifiable concentration, and the watchdog regularly issued fines for gun-jumping when such mergers were not notified. However, in the respective case, the Croatian Competition Agency accepted the argumentation that Articles 36 and 37 of the Croatian Media Act, respectively Articles 52–62 of the Croatian Electronic Media Act[34], relate to the protection of plurality and diversity of (electronic) media, and only limit capital and personal connections between publishers, media service providers and their affiliated persons, but do not impose restrictions outside that circle. Namely, if any other person (outside that circle) acquires a share in the ownership structure of a publisher, such acquisition could not produce effects on competition within the meaning of media regulations. Therefore, the Croatian Competition Agency concluded that a notification obligation arises only where at least two publishers are parties to the concentration, because the purpose of media-sector specific rules on concentrations is the limitation of market shares enjoyed by publishers on the relevant media market.

However, any change of control arising out of the concentration of TV, radio broadcasters and media services providers must be notified to the Electronic Media Agency. The decision of the Electronic Media Agency on the permissibility of such concentration forms a mandatory document to be supplied to the Croatian Competition Agency when filing the merger notification.

In its separate stream, the Electronic Media Agency assesses whether the acquired share exceeds the share capital thresholds prescribed by the media-sector specific rules. If the respective thresholds are exceeded or certain inadmissible (type of) ownership is involved, the Electronic Media Agency will declare the concentration inadmissible.

[33] Decision of 22 March 2018, No. UP/I 034-03/17-02/012.

[34] Croatian Electronic Media Act (Zakon o elektroničkim medijima; Official Gazette, nos. 153/2009, 84/2011, 94/2013 and 136/2013).

VI. Premium content as a new battlefield

It was to be expected that the electronic communications operators' shift of focus (competition) to new markets, will test the functionality of competition law against new market dynamics. It appears that Croatian case-law is not lagging with market developments. What stands out from previous cases, but fits this technological progress pattern, is one of the most recent decisions concerning premium football content distribution via pay-TV platforms in Croatia.[35]

In the present case, the Croatian Competition Agency revoked, for the first time, an already issued statement of objections due to insufficiently established facts on which the statement was based. It is particularly interesting that the statement of objections was revoked for this reason, even though the procedural rules under the Croatian Competition Act allow – at least if further facts are undisputed[36] – to rectify this omission before rendering a final decision. This only points to the complexity of the case and the possible procedural drama that took place behind the scenes. Although the outcome of these proceedings was that the Croatian Competition Agency did not find evidence of an abuse of a dominant position, we find the conclusions on the matter of relevant markets – as well as the analysis of exclusivity clauses' effects on the downstream market – to be interesting for further discussion.

The case considered the vertical agreement between HT and the company that has rights over premium sports content[37] – the Serbian company HD-WIN d.o.o. and its Croatian affiliate HD-WIN Arena sport d.o.o. (hereinafter; jointly '**HD-WIN**'). In short, via a series of agreements, HT acquired from HD-WIN the right to exclusively distribute premium sport content in Croatia, such as the direct transmission of UEFA Champions League, UEFA Europa League and Croatian national football league[38] through its pay-tv service MAXtv.

The Croatian Competition Agency had, on 14 December 2012, initiated proceedings to investigate whether HT had abused its dominant position with regard to premium football content (distribution market) in the territory of Croatia. The first trigger for this proceeding was the sports TV channel distribution agreement concluded between HT and HD-WIN on 24 October 2012, and its exclusivity terms by which HT had contractually obliged HD-WIN to allow distribution of premium football content only via MAXtv.

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[35] Decision of 6 November 2019, No. UP/I 034-03/12-01/023.

[36] In this context it appears that new facts have been presented by the procedural parties and not challenged later on by the authority.

[37] 'HD-WIN'.

[38] In Croatian: Hrvatska nogometna liga.

1. Why testing the exclusivity terms?

In order to understand why HT had insisted on any form of exclusivity regarding the distribution rights on MAXtv, we must primarily define 'the path' taken by the media rights over UEFA Champions League, UEFA Europa League and Croatian national football league from their initial rights holders to pay-TV's and final customers.

Namely, HT had acquired media rights to football matches within the UEFA Champions League, UEFA Super Cup and UEFA Europa League from the 2012/2013 up to the 2017/2018 season. In the context of national football content, HT had acquired media rights to football matches for from the 2013/2014 up to the 2018/2019 season. Additionally, HT had also acquired media rights for football matches within the UEFA Europa League for the competition season 2018/2019 up to 2020/2021.[39]

At that point, HT was 'inclined' to find the appropriate means to monetize the acquired media rights. Namely, the Croatian Electronic Media Act prohibits an electronic communications operator (such as HT) to simultaneously act as a TV broadcaster.[40] To simplify, the intention of this prohibition is to prevent electronic communications operators – whose purpose is, *inter alia*, to retransmit audio-visual content – from influencing the content being transmitted.

This is where the cooperation with HD-WIN comes in place. Since HD-WIN acts as the broadcaster of the respective sports TV channels, HT concluded the agreements to ensure that these sports TV channels will present the UEFA and the national football league media content.[41] HT also tried to ensure the maximisation of its profit from the monetization of the said media rights and had agreed – in several different forms – that HD-WIN will not deliver this content to any HT's competitor on the pay-TV service market.

2. What the exclusivity terms covered?

Although HT and HD-WIN concluded the total of four Retransmission Agreements, only the first three were the subject of review before the Croatian Competition Agency.

The first Retransmission Agreement did not include the possibility that the sport TV channel is broadcasted on other pay-TV platforms in 'full UEFA and national football league capacity', that is, UEFA Champions League, UEFA

[39] All agreements listed in this paragraph are further hereinafter referred to as: 'Media Rights Agreements'.

[40] Article 61 of the Croatian Electronic Media Act.

[41] 'Retransmission agreement'.

Europa League and national football league content were to be broadcasted only on MAXtv. Unlike the first Retransmission Agreement, pursuant to the second Retransmission Agreement, HD-WIN could request to sub-license rights for the retransmission of the UEFA Champions League, UEFA Europa League and the national football league in the competition seasons 2013/2014 and 2014/2015, in accordance with detailed financial conditions envisaged for two possible sub-license options. Regardless of the difference among the three Retransmission Agreements, HT evidently made no or very little room for HD-WIN to dispose of UEFA and national football league premium content and did not allow the monetization of its investment to a wider range of pay-TV operators in Croatia.

The Croatian Competition Agency pointed out that the media rights for the UEFA Champions League season 2018/2019 and onwards were granted to the incumbent's biggest rival, which dispersed the premium football content between several electronic communications operators on the relevant market.

As a consequence, and for efficiency and procedural economy reasons, the Croatian Competition Agency limited its investigation to seasons starting in 2012 and ending in 2018. The questions that naturally followed were: (i) what were the relevant upstream and downstream markets, (ii) was the HT a dominant undertaking on the relevant upstream market, and (iii) how did its position on the upstream market reflect on the downstream market regarding the exclusivity terms in all three Retransmission Agreements?

3. The relevant markets

Regarding the relevant upstream and downstream markets, it has to be noted that the Croatian Competition Agency did not establish its own particular case law relevant to the matter of premium football content. Therefore, this case follows the findings of the European Commission and the Court of Justice of the EU regarding the content distribution market, TV channel distribution market and pay-TV channel retransmission market, that is, the three-tier vertical distribution channel.

i. The premium football content market

The Croatian Competition Agency primarily referred to the Group Canal+ case.[42] It concluded that different types of content vary depending on their demand from both end consumers and broadcasters, distinguishing between the so-called premium and regular football content. Premium content usually

[42] Decision of 13 November 2001, No. COMP/M.2483 – GROUP CANAL+/RTL/GJCD/JV, para 19 and 21a; 'Group Canal+'.

has lower and limited degree of substitutability and can thus be regarded as a separate market.

In essence, the Croatian Competition Agency further continued with the conclusion that UEFA matches fit such premium content profile since (i) viewers are not attracted to separate matches within the UEFA leagues, (ii) UEFA content is able to ensure higher TV channel ratings during longer periods of time, and thus creates viewer loyalty, (iii) UEFA matches are played during work days while other regular competing matches are usually not played during Monday-Friday schedule and, finally, (iv) UEFA matches are in general played throughout the entire year, which enables creation of a brand valuable for broadcasters.

Regarding the national football league content, the Croatian Competition Agency analysed the relevant facts presented within the case file and determined that HT paid almost the same amount to media content providers for UEFA and for national football league content, concluding that HT values these two contents equally.

Also, ratings data have shown that national football league and UEFA content have much higher numbers than the rest of the content on sport TV channels.

In any event, the Croatian Competition Agency's relatively detailed analysis of all market levels led to the conclusion that this case concerned an example of an upstream premium football content market, territorially limited to the Republic of Croatia, whereby the conditions on such upstream market essentially influence conditions, and produce effects, on the relevant downstream pay-TV channel (retransmission) market in Croatia. In light of the above, the Croatian Competition Agency went on to conclude that UEFA and national football league contents are to be regarded as a separate premium football content market – in the relevant upstream market.

ii. TV channel distribution market

Next, the Croatian Competition Agency considered the middle market level, the TV channel distribution level. EU case-law on this matter usually differentiates between two types of TV channels – so called *pay-TV* vs. *free-TV* – which in principle creates two separate markets.[43]

What was important for the present case, and what in fact differentiated the two types of channels and markets, was the value of the content. Namely, free-TV broadcasters accumulate their revenue by means of paid advertisements and are thus aiming at reaching out to the maximum possible number of viewers. However, free-TV broadcasters usually do not emphasize

[43] Decision of 21 December 2010, No. COMP/M.5932 – News Corp/ BSkyB ('BSkyB'); Decision of 2 April 2003, No COMP/M.2876 – NEWSCORP/ TELEPIU ('Telepiu').

the quality and value of the content since their revenue does not come from end viewers and their interest choices.

On the other side, pay-TV broadcasters usually take special care of the quality of their content and the viewers' demand in order to capture viewers' interest and their willingness to pay for the ability to access their TV channels.

iii. Pay-TV channel retransmission market

The last level of review dealt with the market level concerning distribution towards final consumers (end viewers). Once again, the Croatian Competition Agency referred to EU Commission examples such as BSkyB and Telepiu, when differentiating between pay-TV and free-TV service as two separate markets.

The biggest difference of the pay-TV service from the free-TV service is its component of reduced interchangeability in the short period of time. Besides that, the differentiating factors include: (i) consumers' willingness to use pay-TV services in order to access a wider set of TV channels and richer content offer, and (ii) the fact that users of pay-TV service are usually motivated by the fact that their interest for, say, wider sports or film content cannot be satisfied with the offer of free-TV services, and are thus prepared to pay additional price for accessing that content via pay-TV platforms.

The Croatian Competition Agency dismissed HT's argument that UEFA and national football league content are also still accessible to all viewers via HT's special pay-TV mobile service platform and its online pay-per-view TV platform, which enables access regardless of whether the person is a MAXtv subscriber or not, and regardless of whether the person uses any other of HT's service. The Croatian Competition Agency's counterargument was that those services are only accessible via additional electronic devices (tablet, smartphone etc.) which are not as simple to use as regular pay-TV devices (TV sets and accompanying devices which depend on the pay-TV mode). Also, the Croatian Competition Agency argued that usage of these services requires broadband internet access. Interestingly, the Croatian Competition Agency also argued that MAXtv as the 'regular' pay-TV service provides for much wider content access (in terms of a content type) than that of special HT's pay TV services 'MAXtv to Go' and 'PPV Match servis' which – albeit available to all consumers – can only provide paid access to a specific football match or several chosen matches. This, combined with the price of broadband internet access and the price of an additional electronic device, according to the Croatian Competition Agency, amounts to a more expensive version of accessing the respective content, which cannot be regarded as a substitute to MAXtv.

The Croatian Competition Agency based this conclusion mostly on the advisory opinion submitted by HAKOM. Once more, when accessing possible

infringements in the electronic communications sector, the expert opinion of the regulator was used as a pillar for the competition law assessment.

Moreover, in addition to the above, when analysing the retail market for broadband Internet access, HAKOM concluded that there is effective competition in the market for overall pay-TV services. HAKOM stated that the pay-TV services market is not subject to *ex-ante* regulation and was of the opinion that, even without such regulation, the market would achieve a level of effective competition. Although HAKOM did not analyse the type of content offered by the operators, the Croatian Competition Agency basically accepted this position as its own in the decision.

In our opinion, this entire assessment is lacking the test of interchangeability from the viewpoint of end viewers opting for the basic set of a particular pay-TV service with the addition of sports channels, that is, consumers particularly interested in additional sports content. Although these consumers probably do present a minority, the Croatian Competition Agency, in our view, conducted insufficient analysis regarding the question of whether HT's special pay-TV services (mobile and online pay-per-view) could provide for an adequate alternative. This particularly since the Croatian Competition Agency also stated that these consumers opt for more specific content – namely the UEFA Championships League or national football league matches – than those simply aiming for more choice in various different content groups.

Further, if the upstream market is narrowed down only to premium sports content, is it possible that it should have been seen as such (narrow) also in the downstream market? In other words, the Croatian Competition Agency considers premium sports content so distinct and special that there is no substitute on the upstream market. However, on the downstream market this content is placed in the same basket with all other content.

4. HT's market share on the relevant upstream market

Regarding the question of HT's position on the relevant upstream market, and the ability to influence the relevant downstream market, the answer in this case was simply straightforward.

Since the Media Rights Agreements have granted HT the exclusive media rights for the referenced UEFA and national football league content, starting with the season of 2012/2013 and ending with competition season of 2017/2018, HT has been acting as the dominant undertaking on the upstream market. For the purpose of completeness, the Croatian Competition Agency has also considered HT's affiliation with its parent company, which, not surprisingly, led to the conclusion that alongside its contractual advantage, HT also supersedes

its competitors regarding access to financial, technological and infrastructural means. These factors have only strengthened the claim of HT's dominance and its prevailing influence on the market.

5. Exclusivity clauses – HT abusing its dominant position on the upstream market?

Finally, once the Croatian Competition Agency established the relevant market(s) and the fact that HT was in a (dominant) position [upstream] which enabled it to influence the downstream market, the final question to be answered was whether the exclusivity clauses and/or their effects amounted to an abuse of HT's dominant position.

Although one might expect extensive argumentation and analysis when answering this question, the Croatian Competition Agency has instead provided a 'two-criteria' analysis, whereby it concluded that there was no abuse since the first condition for refusal to supply was not met, and that further assessment of the remaining two conditions is therefore not required.

More precisely, the Croatian Competition Agency concluded that HT was facing efficient competition on the downstream market despite having exclusivity over premium football content for the territory of the Republic of Croatia.

The Croatian Competition Agency analysed the criteria of income and number of subscribers to pay-TV services on the Croatian market – that of HT and its competitors – during the period between 2010 and 2017. In essence, findings indicated the decrease of HT's market share on the basis of both criteria – despite the fact that HT's income and number of subscribers have continuously grown during the relevant period of time (in relative terms, HT was not a winner).

Thus, two metrics were taken into account for measuring the market share: revenues and the number of users. The Croatian Competition Agency equated them to benchmarks, which in our opinion is one of the possible ways forward, but at the same time has to be sufficiently elaborated. However, the Croatian Competition Agency paid little attention to this. Namely, it is possible that with respect to premium content, revenues are a better proxy than the number of users (as users, in terms of willingness to pay for additional content, may vary substantially across different types of content).

However, we are left under the impression that the analysis could have been narrower in its general setup. As already indicated earlier, the Croatian Competition Agency had never taken into account the relevant group of end viewers who are very particular in their content choice, that is, the group seeking only or mainly sports and/or (premium) football content. Needless to say, any such analysis of – probably only minority – group tendencies

would outweigh or change the statistics that were presented in the Croatian Competition Agency's decision. However, such review would probably put a different light on the part of the market directly affected by the conditions of exclusivity – the UEFA and national football league content.

It is also interesting to note that the analysis refers to the absence of effects, and pivots around the fact that HT's market share is failing or declining slightly. This is a significant conclusion, but it would gain special weight if it were brought into the – counterfactual – relationship with the effects of a possible situation 'without that exclusivity', where it could, for example, be possible that the market share of HT would fall rapidly without such exclusivity.

VII. Concluding remarks

Finally, if one would wish to draw a single conclusion from the current decisional practice which the Croatian Competition Agency established – for electronic communications markets – the result would probably be, at the outset, the following: a hefty set of experience in dominance abuse cases, mixed with several complicated merger cases, and a notable lack of prohibited agreements and concerted practices cases. If one would wish to dig deeper, more precisely into the results and statistics of the respective cases, one might find him/herself surprised that most of the dominance abuse cases have been dismissed due to supposed lack of procedural requirements. This, however, does not alter the fact that the relevant decisional practice addressing electronic communications markets is still overrepresented, a fact that could certainly benefit both the Croatian Competition Agency and market players in the upcoming period.

Namely, the conclusions of the most recent decision, that is, the one concerning premium football content distribution via pay-TV platforms in Croatia, should not only be read as an interesting mix and match case in terms of how electronic communication operators manage to enter and connect different markets, but also as a turning point. Namely, this could be a beacon case showing that dominance abuse assessment in electronic communications markets would necessarily also involve an assessment of other markets, i.e. markets which are not traditionally perceived as part of electronic communications. Not only would such cases force the Croatian Competition Agency to require additional procedural help from a wider scope of regulatory agencies, but it would most probably ask for closer attention vis-à-vis leveraging abuses and thereby provoking new definitions in terms of relevant markets and what should consequently be considered as an abuse and against whom.

At this point in time, the emerging need for global distancing in physical terms is increasing the need for global connectivity and internet access services. As the demand increases, oligopolistic market structures may see new challengers. Each operator has the incentive to offer better, more diverse and cheapest possible option. In terms of diversity, providers are evidently particularly keen to offer not only useful but also content-wise and entertainment-wise robust services. The winner in this competition is – as always – uncertain, but those with control over infrastructure and capital are heaving a head start. In Croatian terms, it seems right to claim that only some electronic communication operators have the means to maintain their current market power and even improve it, with a look to entering other relevant markets. If these activities cause for some future allegations regarding the abuse of a dominant position, the Croatian Competition Agency has started to pave the road how to address such cases. On the other hand, it will be interesting to monitor how the case law will develop in terms of distancing from current, fairly 'set in stone', market definitions and typology of abuses.

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