

**Jasminka Pecotić Kaufman, Vlatka Butorac Malnar,
Dubravka Akšamović,
Competition Law in Croatia,
Kluwer Law International 2019, p. 232**

The book ‘Competition Law in Croatia’¹ represents the last volume of the ‘International Encyclopedia of Competition Law’² books collection published by Wolters Kluwer, which covers over 30 competition law jurisdictions across the world.

The authors of this volume are 3 distinguished Croatian academics, who have great interest in competition law: while Prof. Pecotić Kaufman is Professor at the University of Zagreb,³ Prof. Butorac Malnar teaches competition and commercial law at the University of Rijeka,⁴ while Prof. Akšamović is Head of the Department of Business Law at the University of Osijek.⁵ During the last two decades, the 3 authors have published extensively in the field of competition law in Croatia and presented their work at international conferences. Finally, it is worth noticing that the authors are also actively involved in the Croatian Association of Competition Law and Policy, which represents the main discussion forum in the country among practioners, enforcers and academics.

Similarly to the other books included in the same collection, this volume is divided in 3 main sections: Part I discusses the sources of competition law in Croatia, as well as a number of general concepts, such as the concept of undertaking and relevant market definition. In addition, chapter 5 provides a detailed analysis of the system of public and private enforcement of competition law in Croatia. Part II, on the other hand, discusses the application of the rules concerning anti-competitive agreements, abuse of dominance and merger control in Croatia, analysing how the *Agencija za zaštitu tržišnog natjecanja* (that is, the Croatian competition agency, AZTN)⁶ and the courts have enforced these rules in the last twenty years. Finally, Part III offers

¹ J. Pecotić Kaufman, V. Butorac Malnar, D. Akšamović (2019), *Competition Law in Croatia* (Kluwer Law International, the Hague).

² <https://ielaws.com/encyclopaedias/iel-competition-law> (18.07.2020).

³ <http://www.efzg.unizg.hr/katedre-29721/pravo/clanovi-29958/prof-dr-sc-jasminka-pecotic-kaufman/29970> (18.07.2020).

⁴ http://pravri.uniri.hr/files/nastavnici/vbutoracmalnar_hr.pdf (18.07.2020).

⁵ <https://www.pravos.unios.hr/katedra-trgovackog-prava/doc-dr-sc-dubravka-aksamovic> (18.07.2020).

⁶ <http://www.aztn.hr/>

a detailed analysis of the procedural rules applied by the Croatian NCA in the context of antitrust investigations and in the field of merger control.

Croatia adopted its first Competition Act in 1995, a few years after having declared its independence from Yugoslavia, and started the process of transition from socialism to a market economy.⁷ It is worth noticing the gradual development of competition policy in the country, achieved via a series of amendments to the Competition Act. The original legislation was first amended in 2003, allowing Croatia to comply with the EU competition law *acquis* in the context of EU accession negotiations, and then later on in 2009, in order to change the enforcement structure of competition law in Croatia. In the original version of the legislation, in fact, the the AZTN did not have the power to directly impose sanctions for violations of the Competition Act. Instead, the agency had to bring an action to the ‘misdemeanor’ court, which would decide on the case. As the name of the tribunal suggests, this court could impose only ‘minor’ fines on undertakings breaching competition rules.⁸ By granting to the AZTN the power to directly fine undertakings, Croatia showed the intention to increase deterrence *vis-a-vis* competition law violations and by so doing, contribute to the development of a competition culture in the country. Further amendments to the Competition Act were adopted in 2013, in the aftermath of the accession of Croatia to the EU, and most recently in 2017, in order to transpose the Damages Directive at the internal level.⁹ Besides the Competition Act, the AZTN has adopted a number of guidelines that fully comply with the EU competition law *acquis*.¹⁰

Two aspects of the Croatian Competition Act diverge from the relevant EU *acquis*: first of all, Article 12 provides a rebuttable presumption of dominance for undertakings that hold a 40% market share.¹¹ Though such threshold has been followed *de facto* by the European Commission and by the Court of Justice EU,¹² it has never been legally codified at the EU level – that is, Article 102 TFEU keeps an open definition of the concept of dominance. A rebuttable presumption of dominance usually leads a competition agency to place excessive emphasis on the undertaking’s market share in the context of abuse of dominance cases. It is doubtful whether such presumption still makes sense in the context of the digital economy, which is characterized by contestable markets, where the market share is rather unstable and thus it plays a minor role in an antitrust analysis.

⁷ *Supra*, Pecotić Kaufman, V. Butorac Malmar, D. Akšamović, p. 21.

⁸ *Ibidem*, p. 22.

⁹ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. OJ L-349/1, 5.12.2014.

¹⁰ An English translation of the Croatian competition act and relevant legislations is available at: <https://www.aztn.hr/en/antitrust-and-mergers/legal-framework/> (18.7.2020).

¹¹ Croatian Competition Act, consolidated text OG 79/09, 80/13. Art. 12. An English translation of the Act is available at: <https://www.aztn.hr/ea/wp-content/uploads/2015/05/COMPETITION-ACT-consolidated-text-ENG.pdf> (18.7.2020).

¹² Case C-62/86, *AKZO Chemie BV v. Commission* (1991) ECLI:EU:C:1991:286.

From a procedural point of view, Article 58(13) of the Croatian Competition Act allows the AZTN to adopt non-infringement decisions to close investigations concerning a breach of Articles 101–102 TFEU. While justified by reasons of legal certainty for the complainant, such provision is incompatible with *Tele 2 Polska*,¹³ where the Court of Justice EU ruled that under Article 5(2) Regulation 1/2003, NCAs of the EU Member States may ‘close investigations’ under Article 101–102 TFEU rather than adopting a ‘non-infringement decisions’.¹⁴ As noted by the authors in this book,¹⁵ in 2015, Article 58 led to a conflict between the AZTN and the Croatian High Administrative Court in *Hrvatski Telekom*: while the agency claimed that Article 58 was inapplicable, since it contradicted the *Tele 2 Polska* case-law, the High Court considered the CJEU case-law inapplicable in the case.¹⁶ Convinced that the wrong interpretation by the High Court was due to the incorrect translation into the Croatian language of Article 5(2) Regulation 1/2003, in 2016, the AZTN successfully asked the European Commission to modify the Croatian version of Article 5(2) Regulation 1/2003.¹⁷ Following the modification of the translation, the High Court has re-considered its previous ruling: in spite of the language of Article 58, the AZTN now routinely closes its investigations due to the lack of evidence without adopting any non-infringement decision.¹⁸

Hrvatski Telekom is one of the several court cases discussed in the book. In this regard, it is worth noticing the role played by the Croatian Constitutional Court in competition law enforcement. Unlike other EU Member States, the Croatian Constitutional Court has heard several complaints in the field of competition law. In its 2008 landmark ruling in *PZ Auto*, the court recognized the duty of the AZTN to interpret the national competition act in light of the case-law of the Court of Justice EU.¹⁹ It is worth mentioning that at that time Croatia was still a EU candidate country; the Constitutional Court recognized such obligation as stemming from the Article 70(2) of the Stability and Association Agreement (hereinafter; SAA) concluded by Croatia and the EU in 2001.²⁰ More recently, the Constitutional Court has annulled previous rulings of the High Administrative Court on the basis of their

¹³ Case C-375/09, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Tele2 Polska sp. z o.o.* (2011) ECLI:EU:C:2011:270.

¹⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ L-1/1, 4.1.2003. Art. 5(2).

¹⁵ *Supra*, Pecotić Kaufman, V. Butorac Malnar, D. Akšamović, p. 81.

¹⁶ In relation to the application of the *Tele 2 Polska* case-law in a number of countries of Central and Eastern Europe, including Croatia, see: A. Svetlicinii, M. Bernatt, M. Botta (2018) “The Dark Matter in EU Competition Law: Non-Infringement Decisions in the New EU Member States Before and After *Tele2 Polska*”. *European Law Review*, 43(3), 424–446.

¹⁷ <http://www.aztn.hr/en/7178/> (18.07.2020).

¹⁸ *Supra*, Pecotić Kaufman, V. Butorac Malnar, D. Akšamović, p. 81.

¹⁹ Decision of the Constitutional Court of Croatia of 13 February 2008, U-III-1410/2007.

²⁰ Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part. OJ L 26/3, 28.01.2005.

lack of constitutionality.²¹ As argued by the authors of the book, such a unusual and pro-active role of the Constitutional Court might be explained by the fact the Croatian Competition Act does not provide for a second instance of appeal: the AZTN decisions, in fact, may be first appealed to the High Administrative Court and only in exceptional circumstances to the Supreme Court.²²

The section concerning private enforcement of competition law in Croatia represents the most interesting part of the book.²³ This section of the volume analyzes in great details how Croatia has transposed the Damages Directive and how the new procedural rules interact with the pre-existing code of civil procedure. Similarly to other EU Member States, Croatia transposed the Damages Directive by adopting a new Act on Antitrust Damages – that is, new legislation providing procedural rules applicable to antitrust damage claims.²⁴ While the new Act reflects the provisions of the Directive, it also tries to ‘fill in’ the gaps left by the Directive and find a ‘compromise’ with existing procedural rules. The rules on disclosure of evidence represent a good example in this regard. On the one hand, Article 5 Damages Directive grants to the national civil judge the power to order the disclosure of ‘relevant categories of evidence’.²⁵ On the other hand, similarly to other civil law jurisdictions, Croatian general rules on civil procedure only allow the disclosure of specific/individual documents.²⁶ In transposing Article 5, the Act on Antitrust Damages allows the parties to obtain the court-assisted disclosure of ‘specified or specifiable evidence’, depending on the circumstances of the case.²⁷ As noted by the authors of the book, the Act on Antitrust Damages follows a ‘stricter’ approach than Article 5 Damages Directive in relation to the disclosure of evidence, in order to find a ‘workable compromise’ with the general rules of civil procedure.²⁸

The book is very informative: it includes a detailed account of the relevant competition rules in Croatia and the major enforcement cases of the past two decades. Unfortunately, the manuscript of the book was finalized before the adoption of the ECN+ Directive, which is expected to be transposed by February 2021.²⁹ Therefore,

²¹ See, in particular, the rulings of the Croatian Constitutional Court in *Presečki Grupa* and in the *Private Security Company Cartel*.

Supra, Pecotić Kaufman, V. Butorac Malmar, D. Akšamović, p. 216–217.

²² *Supra*, Pecotić Kaufman, V. Butorac Malmar, D. Akšamović, p. 215.

²³ *Ibidem*, p. 94–113.

²⁴ Act on Actions for Damages Arising out of Antitrust Infringement. Official Gazette of the Rep. Of Croatia n. 69/17.

²⁵ *Supra*, Directive 2014/104/EU. Art. 5.

²⁶ *Supra*, Pecotić Kaufman, V. Butorac Malmar, D. Akšamović, p. 106.

²⁷ *Supra*, Act on Antitrust Damages, Art. 6(1).

²⁸ *Supra*, Pecotić Kaufman, V. Butorac Malmar, D. Akšamović, p. 106.

²⁹ Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. OJ L-11/3, 14.1.2019. Art. 34.

the book does not include any discussion of the impact of the ECN+ Directive in Croatia.

The book is relevant for academics, practioners and enforcers interested in competition law enforcement in Croatia. More generally, the book may be of interest for competition law experts interested in the enforcement of EU competition rules in Central and Eastern Europe.

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