

The Administrative Court annuls the decision of the Competition Authority prohibiting a merger between the two largest sugar producers in the Republic of Serbia (Sunoko/Hellenic Sugar Industry)

On 8 June 2012, the Serbian Administrative Court (the “Court”) annulled the decision of the Serbian Competition Authority (the “Competition Authority”) which prohibits merger between a company Sunoko d.o.o. Novi Sad, with its registered seat at Novi Sad, the Republic of Serbia (“Sunoko”), and a company Hellenic Sugar Industry SA, with its registered seat at Thessaloniki, Greece (“Hellenic”) and returned the matter to the Competition Authority for a new decision.

History of the Sunoko case

Sunoko is a subsidiary of MK Group, the largest sugar producer in Serbia having a market share of 42-44% on the Serbian sugar market (the “**Relevant Market**”). Hellenic is present on the Relevant Market as the majority shareholder in two sugar factories. Hellenic’s market share on the Relevant market is 32-34%.

Last year, Sunoko expressed an interest in acquiring an 82.33% stake in Hellenic from Hellenic’s majority shareholder Agricultural Bank of Greece S.A. (“**ATE Bank**”) and in subsequently acquiring the remaining shares in Hellenic from the minority shareholders on the Athens Stock Exchange. Such acquisition would lead to Sunoko having the minimum of 82.33% and maximum of 100% of shares in Hellenic and, in either event, Sunoko establishing the direct control over Hellenic.

In the course of its review of the proposed acquisition of control over Hellenic by MK Group, the Competition Authority took into consideration the fact that by completion of the relevant transaction, the market share of Sunoko on the Relevant Market would be increased to up to 78% which would strengthen the dominant position of Sunoko. Furthermore, the Competition Authority was of the opinion that merger notification did not provide enough information on issues such as the exact market influence of undertakings involved and explanations related to structural changes on the Relevant Market caused by such merger. Thus, the Competition Authority decided to conduct the so-called *ex officio* proceedings and requested from the undertakings to submit all the necessary additional information and proposals. As a result of such additional proceedings, the Competition Authority finally rendered a decision to prohibit the proposed merger.

Court review

Sunoko subsequently submitted an appeal to the Court against the Competition Authority’s decision.

In the course of the appeal proceedings, the Competition Authority asserted that its decision contained a detailed explanation of the relevant reasons in support of its view that Sunoko’s proposed structural remedies were not sufficient for the purpose of approving the proposed transaction. The Competition Authority was of the opinion that the proposed structural remedies (*i.e.*, that MK Group would divest one of its existing sugar beet processing plants in Serbia) could not ensure that the selling price of sugar per tonne on the Relevant Market would not be significantly higher than the price of sugar within the EU market.

In addition, the Competition Authority insisted that the Court was obliged, according to the applicable Serbian legal framework, to hold an oral, public hearing due to the importance of this case, which the Court did not do in the course of the appeal proceedings.

On the other hand, Sunoko was of the opinion that the geographical relevant market should have been the whole EU territory and Serbia, and not only the Relevant Market, since Sunoko achieves almost 40% of its turnover on the EU market. Furthermore, Sunoko insisted that the market situation of the Relevant Market would not allow for Sunoko to abuse its dominant position on the Relevant Market.

The Court decided to annul the Competition Authority's decision due to the fact that the Competition Authority failed to offer a proper explanation of its rejection of the structural remedies proposed by Sunoko. Specifically, according to the Court's decision, the Competition Authority did not provide sufficient evidence supporting its view that the structural remedies proposed by Sunoko were not acceptable to the Competition Authority especially given the fact that Sunoko was willing to divest itself of a part of its business.

Conclusion

The Sunoko case is a very important one in light of MK Group's dominant position on the Relevant Market and the general perception of the public in Serbia that sugar prices in the country are higher in comparison to those on the EU market. One would hope that the new decision will offer some substantive criteria for the assessment of similar types of transactions involving dominant market players that may arise in the future. In particular, it is expected that the Competition Authority will continue to follow the key principles of the EU merger control rules in its substantive assessment of concentrations and will pay particular attention to cases in which undertakings would acquire or strengthen their dominant position as a result of a merger.

Source: Mirko Lalatović, Tijana Arsenijević, The Administrative Court annuls the decision of the Competition Authority prohibiting a merger between the two largest sugar producers in the Republic of Serbia (Sunoko/Hellenic Sugar Industry), June 2012, e-Competitions, N°49233, www.concurrences.com

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