

## The Competition Authority approved (subject to conditions) a merger between the two largest sugar producers in the Republic of Serbia

*On 13 February 2013, the Commission for the Protection of Competition of the Republic of Serbia (the “Competition Authority”) approved, under conditions related to the fulfilment of certain structural and behavioural measures, a merger between Sunoko d.o.o. Novi Sad, a company with its registered seat at Novi Sad, the Republic of Serbia (“Sunoko”) and Hellenic Sugar Industry SA, a company with its registered seat in Thessaloniki, Greece (“Hellenic”).*

### History of the case

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

In the course of its review of the proposed acquisition of control by MK Group in Hellenic, the Competition Authority took into consideration the fact that with the completion of the relevant transaction, the 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 the merger notification did not provide enough information on issues such as the exact market influence of undertakings and explanations related to structural changes caused to the Relevant Market by such merger. Thus, the Competition Authority decided to conduct ex officio proceedings and asked 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 prohibiting the above-mentioned merger.

Following the Competition Authority’s decision, Sunoko submitted an appeal to the Administrative Court against the Competition Authority’s decision. The Administrative 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 refusal to accept the structural measures proposed by Sunoko, and returned the matter to the Competition Authority for a new decision.

### Competition Authority’s new decision – Sunoko ordered to implement structural and behavioural measures

On 13 February 2013, the Competition Authority rendered a new decision in the Sunoko case approving the merger subject to the fulfilment of the following measures:

#### (i) Structural measures

The first condition which Sunoko has to comply with is to divest or use all reasonable endeavours to divest a part of the business that it acquires from Hellenic, namely the “**Šajkaška Žabalj**” sugar plant (the “**Plant**”). Sunoko is obliged to sell the Plant to a suitable purchaser, who will have to meet certain conditions. For example, the purchaser cannot be a party that is related to Sunoko or to the owner of MK Group; and it must have sufficient funds to maintain and develop the Plant. Furthermore, Sunoko is also obliged to nominate a trustee to ensure the proper management of the Plant, a trustee to



supervise the Plant, and a trustee to conduct the sale of the Plant. Sunoko's nominated trustees must all be approved by the Competition Authority.

The Competition Authority set a one-year deadline for Sunoko to sell the Plant, although such deadline may be extended for additional year, if necessary. If Sunoko fails to sell the Plant within such extended deadline, the Competition Authority may reconsider its decision. In any event, after the sale of the Plant, Sunoko is prohibited from acquiring control over the Plant within the following ten (10) years. As to the price for which the Plant may be sold, within the first year deadline, Sunoko will not be obliged to sell the Plant for a price that is pro rata lower than the price for which Sunoko acquired it from Hellenic; while in the period of the extended deadline (of one additional year) the trustee in charge of the sale will be responsible for setting the sale price for the Plant.

Finally, the Competition Authority imposed on Sunoko a number of obligations, such as the obligation to continue to employ the same personnel within the Plant, the obligation to protect all the assets of the Plant, and the obligation to inform the Competition Authority of any developments related to the sale of the Plant.

### **(ii) Behavioural measures**

The Competition Authority ordered Sunoko to submit to the Competition Authority every six months reports which will contain, inter alia, information and documentation related to total sales of Sunoko sugar on the Relevant Market and the relevant foreign markets (in tonnes), the average price for "spot" and "terminal" sales on the Relevant Market and the relevant foreign markets, and copies of agreements with domestic and foreign customers.

Notwithstanding the above, Sunoko is obliged to inform the Competition Authority about any change to sugar prices applied to certain categories of customers no later than twenty (20) days after the day of the relevant change. Together with such information, Sunoko will have to provide reasons for such sugar price changes; these reasons will be evaluated by the Competition Authority.

### **Conclusion**

It seems that this time the Competition Authority took a different approach to the Sunoko Case; this approach was based primarily on a change of the situation over 2012, in comparison to the situation that prevailed at the time of Sunoko's original merger notification, which was filed in 2011. Namely, during the new investigation procedure, the Competition Authority determined a different ratio between the prices for sugar that were charged to domestic and foreign customers, respectively, from the one determined in the original procedure (i.e., prior to the remand).

Furthermore, the Competition Authority was of the opinion that the structural measures imposed will lead to a change in the structure of the Relevant Market since such a demerger will either introduce a new player on the Relevant Market or strengthen the position of the already existing competitors, depending who will acquire the Plant concerned.

Finally, by prescribing the abovementioned behavioural measures, the Competition Authority will be able to continuously value and measure how Sunoko behaves on the Relevant Market due to the fact that, following the proposed concentration, Sunoko will strengthen its dominant position in the Relevant Market.

It is worthwhile noting that this decision is one of the most complex and detailed decisions in the history of the Competition Authority. It would be interesting to see what the final outcome of this case will be and whether Sunoko will be able to sell the Plant within the proposed deadlines and – in the event that it fails to do so – whether the Competition Authority will further extend the deadline, impose other remedies or even re-assess the Relevant Market in order to determine whether its structure has potentially changed in a way that Sunoko would no longer be obliged to undertake any further actions (such a scenario has arisen in some competition cases in other CEE countries in the past).



**Source:** *Mirko Lalatovic, The Competition Authority of the Republic of Serbia approves subject to conditions a merger between the two largest sugar producers in the country (Sunoko/Hellenic Sugar Industry), 13 February 2013, e-Competitions, N°51105, [www.concurrences.com](http://www.concurrences.com)*

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