

Case No.: UP/I 030-02/2008-02/06

**KONZUM d.d.¹, Zagreb and LOKICA d.o.o.², Drniš
- Conditionally approved concentration**

SUMMARY

The Croatian Competition Agency (hereinafter: CCA) on December 30, 2008 declared the concentration between the undertakings KONZUM d.d. and LOKICA d.o.o. conditionally compatible according to Article 26 paragraph (3) item (3) of the Competition Act. This is a horizontal merger which on one hand, may produce rather significant anticompetitive effects in the groceries retail market in the territory of Šibenik-Knin County, particularly in the towns of Šibenik, Vodice and Murter, with, on the other hand, possible anticompetitive effects in the groceries wholesale market in the territory of the Republic of Croatia. The CCA therefore imposed conditions and obligations which must be fulfilled by the undertakings concerned in order to restore effective competition.

PARTIES

Main business activities of the undertaking KONZUM d.d. are retail of groceries in non-specialized stores, with 636 retail outlets owned or leased, and wholesale of groceries.

As a part of its retail network, KONZUM d.d. has three categories of stores, distributed throughout the territory of the Republic of Croatia: Konzum small shops - shops for everyday shopping, Konzum maxi - medium-sized stores and Super Konzum - stores exceeding 1000 m² used weekly for large family shopping.

KONZUM d.d. has a well developed distribution network for the wholesale of groceries. This part of its activities is performed through its organizational unit VELPRO. VELPRO supplies the own retail network of KONZUM d.d., other traders, and small tradesmen in the country.

The undertaking KONZUM d.d. collaborates with small merchants within the "Plus market" project. Through that project over a thousand small traders are connected with VELPRO unit, which provides for them more favourable terms of purchase of goods.

The undertaking KONZUM d.d. is a member of the AGROKOR Group. Agrokor d.d. holds 71.62 percent share in the equity while the affiliate company Jamnica d.d. holds 11.10 percent share in the equity of the undertaking KONZUM d.d. Consequently, these two members of the AGROKOR Group together hold 82.72 percent share in the equity of the undertaking KONZUM d.d.

AGROKOR Group is a vertically integrated business entity and consists of undertakings with headquarters in the Republic of Croatia and the region in which Agrokor d.d., as the holding company, directly or indirectly holds a majority share. The listed undertakings, in accordance with their business activity, can be grouped into three business groups: food

¹ d.d. = joint stock company

² d.o.o. = limited liability company

production, retail and other activities. The market power of AGROKOR Group is obvious at all levels of vertical markets, from producers through wholesalers to retailers market. Only in 2007 AGROKOR Group grew further, integrating eight new companies with their headquarters in the Republic of Croatia and the region. AGROKOR Group has significant buyer power in respect of the suppliers of products and/or services, and it is an inevitable trade partner to suppliers who largely depend on the presence of its products in the distribution network of AGROKOR Group.

The undertaking LOKICA d.o.o. was established at the end of 2007, and prior to the implementation of the concentration, it assumed liabilities and acquired assets of the undertaking JOLLY JBS d.o.o. It is engaged in retail and wholesale of groceries.

Furthermore, the CCA found that the undertaking LOKICA d.o.o. is a legal successor of the undertaking JOLLY JBS d.o.o. in the segment of activity dealing with the retail and wholesale of groceries. Namely, the sales facilities of the undertaking JOLLY JBS d.o.o. for retail and wholesale of groceries were transferred to LOKICA d.o.o.

Josip Stojanović, as a natural person, holds a 100 percent share in the equity of the undertakings JOLLY JBS d.o.o. and LOKICA d.o.o.

LEGAL FRAMEWORK

In the present case, the CCA applied Croatian Competition Act (Official Gazette, No.122/03), the Regulation on the definition of relevant market (Official Gazette, No. 51/04), and the Regulation on notification and assessment of concentrations (Official Gazette, No. 51/04) and the General Administrative Procedures Act (Official Gazette, No. 53/91,106/93).

Applying the EU criteria arising from the correct application of the rules regulating competition in the European Communities as provided for in Article 35 of the Competition Act, the CCA also took into account the following European legislation: Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ 2004/L 24/1 and Commission Regulation No. 802/2004 implementing Council Regulation No. 139/2004 on the control of concentrations between undertakings (OJ L 133, 30 April 2004), Commission Notice on the concept of concentration; OJ C 66, 2 March 1998) and Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings OJ 2004/C 31/03).

THE FACTUAL AND LEGAL CONTEXT

On 14 January 2008 the undertakings JOLLY JBS d.o.o. and LOKICA d.o.o. concluded the Draft agreement on dissociation and acquisition, transferring thereby the activity of retail and wholesale of groceries and the retail facilities from JOLLY JBS d.o.o. to LOKICA d.o.o.

Thirty retail outlets have been transferred to LOKICA d.o.o. in the area of Šibenik-Knin County, where JOLLY JBS d.o.o. was engaged in the retail and wholesale of groceries.

The legal basis of the concentration is a promissory contract on the transfer of business assets of the undertaking LOKICA d.o.o., entered into on 15 January 2008 between the

undertaking KONZUM d.d. as a buyer and Josip Stojanović as a seller. On the basis of the above agreement the undertaking KONZUM d.d. acquires a 100 percent share in the equity of the undertaking LOKICA d.o.o.

Legal form of the concentration is, within the meaning of Article 19 paragraph (1) item (2) of the Competition Act, the acquisition of the controlling interest of the undertaking KONZUM d.d. over the undertaking LOKICA d.o.o. (whereby the former holds a 100 percent share in the latter).

PROCEDURAL ASPECTS

On 23 January 2008 the undertaking KONZUM d.d., Zagreb submitted the notification of a proposed concentration between the undertakings KONZUM d.d. and LOKICA d.o.o. to the CCA.

The date of the notification of the proposed concentration is considered to be 12 March 2008, since on that day, according to Article 45 paragraph (3) of the Competition Act, the notification was complete.

Taking into account that the proposed concentration could have as a consequence significant prevention, restriction or distortion of competition in the territory of Republic of Croatia, on 3 April 2008, the CCA issued a procedural order instituting the proceedings in accordance with Article 26 paragraph (3) and Article 46 of the Competition Act (2nd phase).

For the purpose of additional analysis of the relevant markets, in the period from April to December 2008, the CCA collected data and statements from KONZUM d.d. and other undertakings that operate in the groceries retail market, (in non-specialized stores, supermarkets and hypermarkets) in Šibenik-Knin County and from undertakings that operate in the groceries wholesale market in the territory of the Republic of Croatia. For that purpose, the CCA released a Request for Information to all undertakings to submit all relevant data relating to the proposed concentration and requested the opinions from the relevant authorities, such as the Ministry of the Economy, Labour and Entrepreneurship, Consumers Association and Croatian Chamber of Commerce. The CCA has also requested the opinions on market effects of the concentration concerned from the undertakings active in all upstream, downstream or neighbouring markets.

Before taking the final decision in the assessment of the concentration, the CCA presented to the parties the evidence of the case and pointed out the anticompetitive effects that the concentration in question could have on the market. Hence, in accordance with Article 26 paragraph 4 of the Competition Act, the CCA asked the parties to propose commitments and set dead lines for the implementation of the measures that would ensure the compliance of the concentration in question with competition rules in the relevant markets.

The CCA established that the measures to restore effective competition in the groceries retail market (in non-specialized stores, supermarkets and hypermarkets) in Šibenik-Knin County and in wholesale groceries market in the Republic of Croatia.

After the analysis of the proposed measures for removing the negative effects on competition by the proposed concentration notified by KONZUM d.d. had been carried

out, the CCA held the oral hearing on 18 December 2008 which provided final evidence in the case.

COMPETITION ANALYSIS

According to Article 7 of the Competition Act and Articles 4, 5, 6, 7, 8, 9, and 10 of the Regulation on definition of the relevant market, the relevant product markets are defined as:

- groceries retail market (in non-specialized stores, supermarkets and hypermarkets)
- groceries wholesale market.

The retail groceries market (relevant geographic market) covers the territory of Šibenik-Knin County, particularly the towns and municipalities: Šibenik, Vodice, Murter, Knin, Driš, Skradin, Brodarica, Tisno, Stankovci, Srima, Kistanje, Jezera, Dubrava, Tribunj and Primošten.

The wholesale groceries market (relevant geographic market) is determined as the territory of the Republic of Croatia.

All collected and analyzed data, facts and circumstances in this case pointed to the following: high individual market shares of the participants after the implementation of the concentration in a structured groceries retail market in Šibenik-Knin County and a high buyer power of the undertaking KONZUM d.d. on the groceries wholesale market in the territory of the Republic of Croatia.

It was established that after the implementation of the proposed concentration the first direct rival in the groceries retail market in Šibenik-Knin County would thereby take over the leader in this market, and their combined market share would amount to some 50-60 percent.

Furthermore, due to the unfavourable market structure, the implementation of the concentration concerned, would cause the market share of the second rival - the undertaking Plodine d.d., to sink below the market share threshold of KONZUM d.d. Particularly important is here the fact that Plodine d.d. has retail outlets that significantly differ from those of the participants of the concentration, i.e. larger in size and located exclusively in attractive tourist resorts of Šibenik-Knin County.

Analyzing the effects of the concentration in question in respect of the number, type and location of the outlets of the participants to the concentration, the CCA found out that by its implementation KONZUM d.d. would acquire the largest number of small outlets, holding a market share of 50-60 percent in small outlets and 70-80 percent in self-service stores, whereas its market share in larger outlets (supermarkets) would also amount to a significant 40-50 percent threshold.

The highest market share after the implementation of the planned concentration would be held by the participants to the concentration in the territory of the town of Šibenik and tourist resorts Vodice and Murter, whereas at the same time KONZUM d.d. would with one outlet in each of them enter the markets in six new municipalities of Šibenik-Knin County.

In terms of the structure of the groceries wholesale market in the territory of the Republic of Croatia, it was established that on this relevant market KONZUM d.d. is also a market leader with nearly 40 percent market share prior to the implementation of the proposed concentration. Its first rival holds hardly a half of its market share. JOLLY JBS d.d. holds a market share of 0-10 percent in the relevant market concerned, however, given its significance as a regional leader in Šibenik-Knin County, the implementation of the concentration in question would further strengthen the undertaking KONZUM d.d. because it can be expected that one of the wholesale supply channels used by small traders in the territory of Šibenik-Knin County will be interrupted. Therefore, it is very likely that KONZUM d.d. will "take over" the buyers of JOLLY JBS d.o.o. in the wholesale groceries market. Given the fact that no other undertaking has a comparable wholesale distribution network, no undertaking can be considered a competing undertaking of KONZUM d.d.

For all the above presented reasons the concentration in question would narrow down consumers choice. In the retail groceries market of Šibenik-Knin County a half of all outlets would be KONZUM d.d. stores, regardless their size and type, excluding the undertakings which operate within the project »Plus marketi«. In addition, the undertaking KONZUM d.d. is also a leading groceries distributor, holding more than 40 percent of the market share in the relevant wholesale groceries market in the Republic of Croatia after the implementation of the concentration concerned.

OUTCOME

Following a detailed economic and legal analysis on 30 December 2008 the CCA declared the concentration between the undertakings KONZUM d.d. and LOKICA d.o.o. conditionally compatible.

The CCA imposed remedies, i.e. obligations and conditions which must be satisfied by the parties to the concentration within certain time limits in order to restore effective competition in the retail market concerned (structural measures). At the same time, behavioural remedies are to be introduced in the wholesale market within the territory of the Republic of Croatia. On the wholesale market, the existing suppliers of the undertaking JOLLY JBS d.o.o., whose legal successor - the undertaking LOKICA d.o.o. is the party to the concentration, should be ensured free access to the market concerned.

MEASURES:

1. The undertaking KONZUM d.d. should dispose of four of its retail outlets in Šibenik, two in Vodice and one in Murter which had been acquired through the implementation of the concentration in question from the undertaking LOKICA d.o.o., or terminate the lease contracts or transfer the outlets to a suitable purchaser.

2. At the same time Lokica d.o.o. (or the preceding undertaking JOLLY JBS d.o.o.), the undertaking controlled by KONZUM d.d., should keep in effect all the agreements that had been concluded before the implementation of the concentration concerned with the suppliers of all products serving retail and wholesale customers. In addition, the terms of sale, the time-limits and conditions for payment arising from the existing agreements concluded between the undertakings LOKICA d.o.o. and JOLLY JBS d.o.o. must remain the same or be even more favourable, non-discriminatory and transparent for all buyers.

In case that any agreement entered into between the undertaking JOLLY JBS d.o.o. and its suppliers has in the meanwhile been terminated and/or the volume of supplies arising from that agreement has been decreased, the undertaking KONZUM d.d. is obligated to re-enter such agreements and/or to restore the agreed supplies. If structural changes occur, the obligations concerned will be transferred to the legal successor of the undertaking LOKICA d.o.o.

3. The undertaking AGROKOR d.d. is to appoint an independent auditor, a company approved by the CCA who will in the following two years report on the implementation of the imposed measures to restore effective competition.

The CCA's final decision is published on CCA's website and in the Official Gazette.

APPEAL

Against the decision on conditionally compatible concentration KONZUM d.d. filed a claim at the Administrative Court of the Republic of Croatia on 28 January 2009. The CCA submitted its statement of defence at the Administrative Court on 26 February 2009. The Administrative Court has not yet decided in respect of the claim.