

SUMMARY

Class: UP/I 030-02/2011-01/026

Case: AZTN vs TDR d.o.o., Rovinj

- Initiative of JT International Zagreb LLC, Zagreb to start formal proceedings on abuse of dominant position

The Croatian Competition Agency (hereinafter: the CCA) issued a decision on 12 January 2012 by which it dismissed the initiative made by undertaking JT International Zagreb LLC, Zagreb (hereinafter: JTI Zagreb) to start formal proceedings *ex officio* to determine the prevention, restriction or distortion of competition by abusing the dominant position against undertaking TDR LLC, Rovinj (hereinafter: TDR).

According to the initiative, TDR was foreclosing the relevant market of distribution, i.e. trade of cigarettes to competitors by concluding agreements with its buyers from the end of 2010, i.e. by the new sales policy which is in force since January 2011 and which results in lower basic rebates and higher lease fee for the use of sales space of the buyers/retailers. JTI Zagreb considered that the analysis of TDR's commercial conditions in 2011 shows that TDR was deliberately offering very low basic rebate to its buyers/retailers, significantly lower than the other competitors in the market. The reason for such low basic rebate, according to JTI Zagreb, is to force the buyers/retailers to conclude additional Lease Agreement of sales-and-storage area and Annex No. 1 of the same agreement. Considering the fact that TDR is inevitable business partner, according to JTI Zagreb, this is the only way buyers/retailers can make decent profit from TDR's products. JTI Zagreb considers that the compensations from the Lease Agreement of sales-and-storage area and Annex No. 1 of the same agreement are disproportionately high compared to the profit from basic rebate, thus presenting strong incentive for buyers/retailers to conclude the Lease Agreement of sales-and-storage area and Annex No. 1 of the same agreement. Since Lease Agreement of sales-and-storage area and Annex No. 1 of the same agreement have significant effects of foreclosing the relevant market it is obvious, according to JTI Zagreb, that it presents TDR's abuse of dominant position. Namely, JTI Zagreb considers that with the lease of sales-and-storage area, which is equal or higher to TDR's market share in previous year, TDR in illegal way freezes its position in the market and reserves more space on shelves than it would otherwise had in competitive environment. TDR's lease of 80 per cent of sales-and-storage area, according to JTI Zagreb, causes that the buyers/retailers are buying 80 per cent of their total needs of tobacco products from TDR. Bearing this in mind, it amounts to "*quantity forcing*" clause which represents non-compete obligation.

In this case, the CCA determined the relevant product market as a market of distribution (trade) of cigarettes, and the relevant geographic market as a whole territory of Republic of Croatia. Furthermore, the CCA determined that TDR was in a dominant position in the relevant market from the beginning of 2010 until October 2011.

Although TDR is still in a dominant position in the relevant market of distribution of cigarettes with a share of 60-70 per cent, analysis made during preliminary investigation in the relevant market showed that its market share in 2010 and especially in 2011 is in constant decrease compared to previous years. Indeed, the analysis confirmed that TDR's market share additionally decreased in second compared to the first half of 2011, while at the same time market shares of its competitors, including the applicant of the initiative, are constantly and progressively increasing. Such trend shows indisputably that the access to distribution channels and to the consumers is significantly improved compared to earlier period. Furthermore, analysis showed that TDR concluded sales agreements with [4000-4500] buyers/distributors since the beginning of 2011, i.e. the inception of new sales policy. TDR also offered Lease Agreement of sales-and-storage area to significant part of buyers with whom it earlier entered into sales agreements and by which it would lease [50-80] per cent of sales and storage area (shelves intended for presentation and sales of tobacco products). From the total number of buyers which was offered Lease Agreement of sales-and-storage area and Annex No. 1 of the same agreement by which is leased additional sales-and-storage area, [40-50] per cent of national buyers, [30-40] per cent of regional buyers and [30-40] per cent of SME buyers refused to sign Lease Agreement of sales-and-storage area and thus did not give TDR to lease [50-80] per cent of shelves intended for presentation and sales of tobacco products. By doing so, in 2011, the retailers left more shelf space available for TDR's competitors and made it possible for the competitors to increase their sales and their market shares. Apart from that, according to the Lease Agreement of sales-and-storage area the maximum share of the sales and storage area that can be taken into lease by TDR cannot be higher than the market share TDR had in the previous year in the relevant market. The retailers, who gave the highest possible sales and storage area into lease to TDR, are obliged to revise the contract in such way that at the beginning of 2012 the maximum surface under lease in 2012 must be adjusted according to the market share TDR had in 2011 in the relevant market. Since in 2011 TDR's market share in the relevant market significantly decreased the adjustment of the sales and storage area with the new, lower market share of TDR will additionally increase the possibility for TDR's competitors to increase their product's presence on the shelves of the retailers/distributors.

On the grounds of the legal and economical analysis made during preliminary investigation in the relevant market it was concluded that TDR's new sales policy, being applied from 1 January 2011 did not have a foreclosing effect for the competitors in the market and it did not restrict the development of competition in the relevant market in Republic of Croatia.

JTI Zagreb has, by its statements in the media, announced a lawsuit against this decision.