

Class: UP/I 034-03/18-02/018  
Reg.no: 580-11/41-2019-002  
Zagreb, 29 January 2019

**CCA vs BAT Investments Ltd, UK and Northern Ireland, present in Republic of Croatia via BAT Hrvatska d.o.o. in liquidation, Zagreb**

**- Initiative for the initiation of an ex officio proceeding for the assessment of compatibility of concentration**

**Decision: Initiative dismissed due to lack of standing to act for the initiation of an ex-officio assessment proceeding in the sense of Article 17 paragraph 6 of the Competition Act given the fact that the criteria under Article 17 paragraph 1 of the Competition Act have not been cumulatively met**

**Case summary:**

Following the initiative made by N.P. from Zagreb for an ex officio initiation of the compatibility assessment proceeding of the concentration between British American Tobacco Investments (Central & Eastern Europe) Limited, UK and Northern Ireland, Globe House, 1 Water Street, London WC2R 3LA and TDR d.o.o., Rovinj, Obala Vladimira Nazora 1, the Croatian Competition Agency (CCA) decided to dismiss the initiative concerned within the meaning of Article 17 paragraph 6 of the Competition Act given the fact that in this particular case the criteria under Article 17 paragraph 1 of the Competition Act have not been cumulatively met. In other words, the issue concerned is not subject to obligatory assessment in line with Article 17 paragraph 6 of the Competition Act that stipulates that the CCA shall assess the compatibility of only those planned concentrations which are subject to obligatory notification under the criteria set forth under Article 17 paragraph 1 of the Competition Act and of the concentrations for which the obligatory notification to the CCA has been provided under separate rules.

Taking the year of 2014 as the relevant year within the meaning of Article 17 of the Competition Act, in the explanation of its decision the CCA elaborated that in order to assess the compatibility of a concentration the parties to the concentration are obliged to notify any proposed concentration to the CCA if the following criteria are cumulatively met:

1. the total turnover (consolidated aggregate annual turnover) of all the undertakings - parties to the concentration, realized by the sale of goods and/or services in the global market, amounts to at least HRK 1 billion in the financial year preceding the concentration and in compliance with financial statements, where at least one of the parties to the concentration has its seat and/or subsidiary in the Republic of Croatia, and,

2. the total turnover of each of at least two parties to the concentration realized in the national market of the Republic of Croatia, amounts to at least HRK 100,000,000 in the financial year preceding the concentration and in compliance with financial statements.

Further, the CCA quoted that under Article 17 paragraph 3 of the Competition Act the total annual turnover defined under paragraph 1 hereof shall be calculated by: 1. adding together the respective turnovers of the following: the undertakings concerned; those undertakings in which the undertaking concerned, directly or indirectly owns more than half the shares or capital or business assets, or has the power to exercise more than half the voting rights, or has the power to appoint more than half the members of the management board or the supervisory committee or similar administrative or managing body, or in any other way exercises a decisive influence on the right to manage business operations of the undertaking; those undertakings which have in the undertaking party to the concentration (acquiring or controlling undertaking) the rights or powers previously listed, and those undertakings in which undertakings referred to in line 3 of this point have the rights or powers listed in line 2 of this point.

However, in this concrete case it has been established that the undertakings Roberto Plus and Smoking cannot be regarded as connected undertakings of the undertaking BAT Hrvatska within the meaning of Article 4 of the Competition Act on the basis of the fact that pursuant to the Agreement on the Settlement of Claims of 8 December 2014 concluded between N.P. and BAT Hrvatska in relation to the undertakings Roberto Plus and Smoking, BAT Hrvatska did not acquire control or decisive influence over the undertakings Roberto Plus and Smoking within the meaning of Article 15 of the Competition Act. Therefore, they have not been taken into account for the establishment of a notification obligation within the meaning of Article 17 paragraph 3 of the Competition Act. This was substantiated by the revised financial statements of BAT Hrvatska for 2014 showing no revenue consolidation of the connected undertakings of BAT Hrvatska in Croatia and that clearly indicated that in 2014 BAT Hrvatska had operated exclusively in the wholesale of tobacco products in Croatia.

In line with Article 74 of the Competition Act the CCA consulted the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings OJ C 95, 16.4.2008, where paragraph 18 explicitly states that control can also be acquired on a contractual basis. However, in order to confer control, the contract must lead to a similar control of the management and the resources of the other undertaking as in the case of acquisition of shares or assets. In addition to transferring control over the management and the resources, such contracts must be characterised by a very long duration of 5, 8, 10 or 15 years (ordinarily without a possibility of early termination for the party granting the contractual rights). Only such contracts can result in a structural change in the market. In this particular case, the Agreement on the Settlement of Claims of 8 December 2014 did not lead to the change in the control of the undertakings Roberto Plus and Smoking and was terminated by the Statement of BAT on 1 September 2015 thus its duration of some 9 months could in no way result in a structural change in the market.

In addition, the CCA carried out the analysis of the Croatian excise tax provisions and the accounting rules applicable in the Republic of Croatia on the basis of which accounts are

kept by the undertakings in the Republic of Croatia, that, on the other hand, serve as the basis for the annual financial statements for a fiscal year. For the purpose concerned, the figures indicated that the calculation of the sales turnover of BAT Investments in the Republic of Croatia in 2014 excluded the excise tax and VAT and as such did not meet the thresholds and the criteria for obligatory notification of a concentration under Article 17 paragraph 1 of the Competition Act, given the fact that BAT through its connected undertaking BAT Hrvatska did not exceed the HRK 100,000,000 threshold in the Republic of Croatia.

Within the meaning of Article 74 of the Competition Act defining that the criteria arising from the application of competition rules applicable in the European Union shall apply the above mentioned has also been underpinned in paragraphs 165 and 166 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings OJ C 95, 16.4.2008 stating that for the purpose of the turnover calculation of the undertakings concerned the deduction of sales rebates and of value added tax and other taxes directly related to turnover is necessary.

To that end the CCA quoted in its decision the relevant paragraphs 165 and 166 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings OJ C 95, 16.4.2008: "Deduction of rebates and taxes: (165) Article 5(1) provides for the 'deduction of sales rebates and of value added tax and other taxes directly related to turnover'. 'Sales rebates' mean all rebates or discounts which are granted by the undertakings to their customers and which have a direct influence on the amounts of sales. (166) As regards the deduction of taxes, the Merger Regulation refers to VAT and 'other taxes directly related to turnover'. The concept of 'taxes directly related to turnover' refers to indirect taxation linked to turnover, such as, for example, taxes on alcoholic beverages or cigarettes".

In this context, the CCA noted that in the application of the Competition Act, and particularly in case of legal voids or uncertainties relating to the interpretation of the rules, it adequately applied the criteria arising from the application of competition rules applicable in the European Union in line with Article 74 of the Competition Act to all cases involving cigarettes, i.e. it excluded the excise tax and VAT in the calculation of the total sales turnover.

Taking all the arguments into account the CCA decided that the criteria for obligatory notification of concentration under Article 17 paragraph 1 of the Competition Act have not been cumulatively met given the fact that the total turnover of each of at least two parties to the concentration realized in the national market of the Republic of Croatia, in 2014 as the financial year preceding the concentration and in compliance with financial statements for the relevant year did not amount to at least HRK 100,000,000, and therefore the CCA could not assess the compatibility of the concentration in this particular case within the meaning of Article 17 paragraph 6 of the Competition Act.

On the basis of the above said the CCA dismissed the initiative concerned due to lack of standing to act for the initiation of an ex-officio assessment proceeding in the sense of Article 17 paragraph 6 of the Competition Act given the fact that the criteria under Article 17 paragraph 1 of the Competition Act have not been cumulatively met.