

Republic of Serbia
Commission for Protection of Competition
No. 6/0-02-461/2012-6
Date: July 10, 2012
Beograd

On July 10, 2012, member of the Council of the Commission for Protection of Competition, under authorization of the President of the Commission for Protection of Competition no. 1/0-06-463/2012-1 dated June 28, 2012, pursuant to Articles 34 and 38, paragraph 5, of the Law on Protection of Competition ("Official Journal of the RS", no. 51/2009), Article 115, paragraph 2, of the General Administrative Procedure Act ("Official Gazette of the RS", nos. 33/97 and 31/2001, and "Official Journal of the RS" no. 30/2010) and Article 2, paragraph 1, item 3 of the Tariff on the level of compensation for activities within the competency of Commission for Protection of Competition ("Official Journal of the RS", no. 49/2011), deciding under notification of concentration no. 6/0-02-461/2012-1 dated June 28, 2012 submitted by company Sunoko d.d. Novi Sad, with registered head-office at Trg Marije Trandafil 7, Novi Sad through its proxy Mr. Bojan Vuckovic, lawyer from partners law office Karanovic & Nikolic from Beograd, Resavska 23, issued a following

Resolution

I Notification of concentration submitted by company Sunoko d.o.o. Novi Sad, with registered head-office at Trg Marije Trandafil 7, Novi Sad, reference no. 20051183 to be implemented by purchase on the part of the said company, on the grounds of open tender, of 20,33% of ordinary shares of AIK Banka a.d., Nis with registered head-office at Nikole Pasica 42, Nis, reference no. 06876366, held by Agricultural Bank of Greece S.A., which would, with previously acquired shares, result in ownership over 24,99% of ordinary shares of AIK Banka a.d. Nis, is dismissed.

II An obligation is established for applicant - company Sunoko, d.o.o. Novi Sad, to pay the amount of EUR 500,00 in dinar countervalue at the medium exchange rate of the National Bank of Serbia valid at the date of payment, on the account of compensation referred to in Article 2, paragraph 1, item 3 of the Tariff on the level of compensation for activities within the competency of the Commission for Protection of Competition ("Official Journal of the RS", no. 49/2011) for issuance of act on dismissal of notification of concentration as stated in paragraph I of enacting terms.

III An obligation is established for the Commission to pay back to applicant - company Sunoko d.d. Novi Sad, the amount paid in excess of EUR 24.500,00, in dinar countervalue at the medium rate of exchange of the National Bank of Serbia valid at the date of payment, on account of issuance of resolution by Commission on approval of concentration in summary procedure, within the period of 3 days from the date on which this resolution became binding.

Reasoning

On June 28, 2012 company Sunoko d.d. Novi Sad, with registered head-office at Trg Marije Trandafil 7, Novi Sad (hereinafter:applicant), submitted to Commission for Protection of Competition (hereinafter: Commission), through its proxy Mr. Bojan Vuckovic from partners law office Karanovic & Nikolic with head-office in Beograd, Resavska 23, notification of concentration (hereinafter:notification) on account of applicant's intend to purchase, through open tender, 20,33% of ordinary shares of AIK Bank a.d. Nis, with registered head-office at Nikola Pasic 42, Nis, reference no. 06876366 (hereinafter: target company), which are in the ownership of Agricultural Bank of Greece S.A. (hereinafter: seller), and thus acquire in total, together with shares it already possesses, 24,99% of ordinary shares of AIK Bank a.d. Nis.

Defects in notification, of which the applicant was informed, were eliminated by supplements to the notification submitted to Commission on July 2,3,5 and 6, 2012. In that way the notification was completed and conditions for acting and decision making of the Commission under the relevant notification in summary procedure were fulfilled.

Upon examination of subject documentation, Commission established that the applicant was granted, pursuant to the decision of the National Bank of Serbia no. 3311 dated May 30, 2012, approval for acquisition of 20,33% of voting rights in AIK Bank a.d. Nis, which would, with the previously acquired shares with voting rights, result in the ownership over 24,99% shares with voting rights (of ordinary shares) in AIK Bank a.d. Nis.Intended acquisition by applicant of 20,33% of ordinary shares of AIK Bank a.d. Nis (i.e. 20,33% of voting shares, since one ordinary share gives right to one vote at the General Meeting of the bank's shareholders) represents, in fact, acquisition of set of shares of that bank in the ownership of Agricultural Bank of Greece S.A. which will be implemented if applicant is nominated as the best bidder in tender procedure which is underway (a part of tender documentation containing also call for statements on interest for purchase of AIK bank a.d. shares in the ownership of Agricultural Bank of Greece S.A. published in daily newspaper Politika of May 7, 2012, Letter of Intent of the applicant for acquisition of relevant set of shares dated May 25, 2012 and Confidentiality Agreement concluded on June 12, 2012 between target company and applicant, were submitted to Commission and attached to subject documentation).

Agricultural Bank of Greece S.A. (seller) is at present majority shareholder in target company holding 20,33% of ordinary shares, whereas companies within MK Group d.o.o. Novi Beograd (to which applicant – hereinafter:MK Group belongs) jointly hold 5,12% of ordinary shares, which is, according to volume, third share in equity capital of target company. Mr. Miodrag Kostic, person with controlling interest in MK Group, is a president of current Management Board of target company, consisting of 5 members in total, of which one member is a representative of seller, as a majority shareholder of target company.It is to be expected that the applicant, which shall, if it buys set of shares of target company held by seller (20,33%), together with previously acquired shares, hold even larger share in equity capital of target company (24,99%), be granted the right to delegate its representative to Management Board of target company.

With regard to above stated, Commission examined circumstance whether applicant (i.e. MK Group it belongs to) with ownership over 24,90% of ordinary shares in target company (i.e. 24,99% of voting shares) can gain "control over target company" referred to in Article 5, paragraph 2 of the Law on Protection of Competition ("Official Journal of the RS", no. 51/2009 – hereinafter: the Law) "representing the possibility of decisive influence on conduct of operations of other or several other market participants", that is, whether relevant transaction leads to concentration in terms of the Law.

Law on Banks (Official Journal of the RS", nos. 107/2005 and 91/2010) stipulates in Article 2 that "controlling interest shall exist when one person has:
direct or indirect right or opportunity to acquire at least 50% of voting rights in legal entity, i.e. direct or indirect ownership over at least 50% of capital of that legal entity, or
possibility to select at least half of members of management board or other executive and management body of that legal entity, or
possibility to effectively hold dominant influence on management of legal entity or business policy of that entity."

At the request of Commission, applicant submitted the following:

Agreement on foundation of Agroindustrijska komercijalna banka "AIK Banka" a.d. Nis (fair copy) dated May 10, 2012 harmonised with Companies Law ("Official Gazette of the RS", nos.36/2011 and 99/2011);

Statute of Agroindustrijska komercijalna banka "AIK Banka" a.d. Nis (fair copy) dated May 10, 2012, also harmonised with Companies Law ("Official Gazette of the RS" nos. 36/2011 and 99/2011);

Rules of Procedure of "AIK Banka" a.d. Nis Assembly, dated May 10, 2012;

Rules of Procedure of Management Board dated October 2, 2006;

Excerpts from the minutes from regular and extraordinary sessions of the shareholders' Assembly of "AIK Banka" a.d. Nis, held in the period April 30, 2010 – May 10, 2012.

Statute referred to in above item 2, in Articles 18, 19, 22 and 23 provides the following:

"Each individual ordinary share gives right to one vote.

Quorum for the session of the Assembly consists of simple majority from the entire number of votes within the voting shares class under the relevant issue, except in cases when the Statute provides that the majority should include large-scale majority.

Decisions at the regular and extraordinary sessions of General Meeting are made by simple majority of votes by present shareholders with voting rights under specific issues, except in cases when the Statute provides that the majority should include large-scale majority i.e. except in case of decision-making on: status changes to the Bank and termination of Bank's operations when in order for Assembly to function and issue decisions, a majority of 2/3 from a total number of shareholders with voting right under particular issue is required.

Repeated regular General Meeting can be held, even if the quorum mentioned in Article 18, of the Statute is not met, except if the Order of Business at the session contains issues for which the Statute provides large-scale majority.

Quorum for repeated extraordinary session consists of one third of total number of shares with voting rights under relevant issues, except in case when the Order of Business at the session includes issues for which the Statute provides different majority.

At the repeated, regular or extraordinary session of General Meeting, decisions are made by simple majority of votes by present shareholders with voting rights under particular issue, which (the said majority) **cannot be lesser than one fourth from total number of shares with voting rights under particular issue**, except in case when this Statute relating to functioning and decision making under particular issues provides for large-scale majority.

Management Board is made of at least 5 (five) and at the most 7 (seven) members, including President, wherefrom one third consists of persons independent from the Bank.

President and other members of Management Board are appointed by General Meeting of the Bank for the period of 4 (four) years, upon previously obtained approval granted by National Bank of Serbia.

Candidates for members of Management Board are proposed by existing Management Board, against obligatory consultation with major shareholders of the Bank.

Member of Management Board cannot be a member of Executive Committee of the Bank."

Rules of Procedure of Management Board referred to in above item 4, in Articles 17 and 23 provide the following:

"President of Management Board shall open the session after he/she has previously established that the session is attended by at least three members of Management Board (quorum).

Every member of Management Board holds one vote.

Members of Management Board vote by declaring to be FOR or AGAINST the proposal or they can abstain from voting.

Decision shall be considered as passed if at least three members of Management Board voted for it, and if in the process of voting, votes are evenly divided, then the casting vote is on the President of Management Board (decision for which the President of the Management Board voted for)."

On behalf of companies within MK Group, MK Group manager, Mr. Jovan Purar gave a statement to Commission dated July 6, 2012 confirming that active members of Management Board of target company "are not affiliated with any of business enterprises within MK Group, i.e. Mr. Miodrag Kostic as a person controlling MK Group in terms of: direct or indirect ownership in entities affiliated with MK Group pursuant to Article 5 of the Law on Protection of

Competition, in terms of labour relations in entities affiliated with MK Group in line with Article 5 of the Law on Protection of Competition, as well as in terms of kinship in strait line and in collateral line up to fourth degree of kinship."

With regard to presented regulations, Commission established in relevant case that:

quorum for passing a decision at the shareholders' General Meeting consists of a majority from total number of shares with voting rights or, in particular cases, of large-scale majority. Applicant would need to possess at least 50% + 1 voting share in order to gain legal control over target company, i.e. at repeated, regular or extraordinary session of the General Meeting, decisions are made by simple majority of votes by present shareholders with voting rights under particular issue, which (the said majority) cannot be less than one fourth from the total number of shares with voting rights under relevant issue, **which the applicant does not hold**, in case shareholders presence at the General Meeting's session of shareholders is minimum (50% + 1 vote), in order to gain actual control (majority for decision-making at the General Meeting's session), applicant needs to hold more than 25% of votes, **which the applicant does not hold** (at the last five sessions of the General Meeting of shareholders of target company, the presence of shareholders amounted to: 62,19%, 58,40%, 65,30%, 66,88% 69,42),

above mentioned possibility, that upon implementation of concentration, applicant has two representatives in Management Board, of which one is President, and that in the process of voting by members of the Board a division in votes occurs, in which case the vote of President would be a casting vote, could occur when Management Board makes decisions on the grounds of votes by three or four members. However, relevant situation would not be regular and continuous and would not result in permanent, but temporary control. Particularly in view of the fact that one third of members of Management Board is within category "persons independent from the Bank", i.e. person employed neither in the Bank, nor in the subsidiary of banking group to which this bank belongs or with shareholders of that Bank, nor it has any direct or indirect ownership in them. " In this case, when Management Board consists of 5 members, and one third is made of persons independent from the Bank, applicant should have in Management Board of target company at least three of its representatives in order to gain control on permanent basis, **which is not bound to happen upon implementation of relevant concentration.**

From the factual position established on the grounds of obtained documentation, out of which follows that in relevant case, except for fulfilment of financial conditions referred to in Article 61 of the Law (for which there is evidence submitted to Commission), none other circumstances emerged making it obligatory by the Law to notify concentration, i.e. concentration pursuant to Article 17, paragraph 1, item 2, in terms of Article 5, paragraph 2 of the Law, has not been created.

Article 115 of the General Administrative Procedure Act stipulates the following:

"Procedure shall be initiated as soon as the authority performs any act for conduct of procedure. If the authority, regarding submitted notification of the party, establishes that there are no conditions for initiation of procedure, it shall make a resolution on dismissal of notification of the party involved. Against such resolution, a separate appeal is allowed."

Having in mind above stated and established factual position, and pursuant to cited regulations, it was decided as in paragraph I of Enacting Terms.

Decision from paragraph II of Enacting Terms is in compliance with Article 2, paragraph 1, item 3 of the Tariff on the level of compensation for activities within the competency of the Commission for Protection of Competition ("Official Journal of the RS", no. 49/2011), prescribing the obligation and the amount on account of payment of compensation for issuance of act on dismissal of notification of concentration.

As the applicant paid on June 29, 2012, on account of compensation for issuance of decision on approval of concentration in summary procedure by Commission, the amount of RSD 2.895.507,50, whereas the procedure was finalised by resolution stated in paragraph I of Enacting Terms of this decision against defined obligation for payment of funds referred to in paragraph II of Enacting terms, the Commission is obliged, pursuant to paragraph III of Enacting Terms to return the amount of EUR 24.500,00 in dinar countervalue at the medium rate of exchange of National Bank of Serbia valid at the date of payment, representing the difference between the amount paid in total by applicant and the amount of established obligation stipulated in paragraph II of Enacting Terms.

Ivan Ugrin
Member of the Council of the Commission

Legal remedy:

Against this Resolution, an appeal is allowed to the Council of the Commission for Protection of Competition within the period of 3 days from the date of receipt of Resolution