

**DECISION**

**Adopted in repeated proceedings upon the ruling of the Court of Bosnia and Herzegovina No.: Uvl-80/10 of 23<sup>rd</sup> March 2011**

**Sarajevo  
April, 2011**

Number: 01-05-26-033- 36-II/09  
Sarajevo, 7<sup>th</sup> April 2011

Pursuant to Article 25 paragraph (1) item e), Article 42 paragraph (2), Article 16, 18 and 49 paragraph (1) item c) of the Competition Act ("Official Gazette of BiH", No. 48/05, 76/07 and 80/09), upon the ruling of the Court of Bosnia and Herzegovina No. Uvl-80/10 of 23rd March 2011, which annulled paragraph 2 of the Decision of the Council of Competition No. 01-05-26-033-22-II/09 of 23rd March 2010, Council of Competition at its 12th (twelfth) session held on 7th April 2011, in repeated proceedings has issued

### **DECISION**

1. Fine is imposed on the undertaking "OPTIMA Grupa" limited liability company for trade of petroleum and petroleum products Banja Luka, Kralja Alfonsa XIII 9, 78000 Banja Luka, amounting to KM 200.000,00 due to the failure to notify the concentration in terms of Article 16 of the Competition Act and for implementing the concentration without the prior Decision of the Council of Competition in terms of Article 18 paragraph (9) of the same Act, which the undertaking is obliged to pay within 8 days from the day of receipt of this Decision. If the imposed fine is not paid within the required deadline, it will be charged in the forced execution procedure, with the associated default interest.
2. Fine from the paragraph 1 of this Decision shall be considered paid if no refund is done in the amount of KM 200.000,00 previously paid based on the Decision of Council of Competition No. 01-05-26-033-22-II/09 of 23<sup>rd</sup> March 2010 until the expiration of the time of performance.
3. This Decision is final and shall be published in the "Official Gazette of BiH", official gazettes of Entities and Brcko District of Bosnia and Herzegovina.

### **Exposition**

Council of Competition in the assessment of concentration of undertaking "OPTIMA Grupa" d.o.o. Banja Luka and the undertaking "ZOVKO" d.o.o. Žepče production, trade and transport company and Production, transportation and trading company "NIELSEN OIL" d.o.o. Žepče on 23rd March 2010, issued an ex officio Decision No. 01-05-26-033-22-II/09 (hereinafter: Decision), whereby 1) it assessed as compatible the concentration in the market of retail sale of automotive fuel in Bosnia and Herzegovina as a result of acquisition of control of the undertaking "OPTIMA Grupa" limited liability company for the trade of petroleum and petroleum products Banja Luka, Kralja Alfonsa XIII No. 9, 78000 Banja Luka, the part of the undertaking "NIELSEN" d.o.o. Žepče and part of the undertaking "Zovko Oil" d.o.o. Žepče and 2) imposed a fine on the undertaking "OPTIMA Grupa" d.o.o. Banja Luka in the amount of KM 200.000,00 due to failure to notify the concentration, pursuant to Article 16 of the Competition Act (hereinafter: Act) and the implementation of concentration without the decision of the Council, in terms of Article 18 paragraph (9) of the same Act.

Undertaking "OPTIMA Grupa" d.o.o. Banja Luka (hereinafter: „OPTIMA Grupa") instituted administrative proceedings before the Court of Bosnia and Herzegovina against the relevant Decision upon which the judgment was rendered on 26<sup>th</sup> November 2010, No. U-270/10, whereby the complaint was dismissed. Thereafter, the undertaking "OPTIMA Grupa" submitted a Request to the Court of Bosnia and Herzegovina for review of court decision number Uvl-80/10.

The Administrative Appeals Chamber of the Court of Bosnia and Herzegovina, examining the request for review of the court decision, on 23rd March 2010 issued a judgment No. Uvl-80/10 partly accepting the Request, and thus judgments of the Court of Bosnia and Herzegovina No U-270/10 of 26<sup>th</sup> November 2010 was revised so that it annuls paragraph 2 of the Exposition of Decision of the Competition Council No. 01-05-26-033-22-II/09 of 23<sup>rd</sup> March 2010, and the case was returned to the Council of Competition for re-settlement in a part that was repealed by the judgment.

In accordance with the above mentioned, acting upon the judgment of the Court of Bosnia and Herzegovina No Uvl-80/10 of 23rd March 2010 (corrected in the Decision on correction No Uvl-80/10 of 4th April 2011), made a decision as in the exposition from the following reasons:

During the proceedings launched upon the Conclusion on initiation of the ex officio proceedings No. 01-05-26-033-1-II/09 of 21<sup>st</sup> October 2009 Council of Competition determined, and the Court of Bosnia and Herzegovina's decisions No U-270/10 of 26<sup>th</sup> November 2010, No Uvl-80/10 of 23<sup>rd</sup> March 2010 confirmed that the acquisition of control of the undertaking "OPTIMA Grupa" of parts of the undertaking ZOVKO d.o.o.. Žepče and NIELSEN OIL d.o.o. Zepce, represents a concentration within the meaning of Article 12 paragraph (1) item b) 3) and paragraph (2) of the Act, and that the requirements of the annual turnover of participants to the concentration stated in Article 14 paragraph (1) item b) of the Act were met, and that the undertaking "OPTIMA Grupa" after concluding the agreement with undertakings ZOVKO d.o.o. Žepče and NIELSEN OIL d.o.o. Žepče, was obliged to notify the concentration pursuant to Article 16 paragraph (1) of the same Act.

Pursuant to Article 49 paragraph (1) item b) of the Act, Council of Competition can impose a fine up to 1,0% of the total turnover achieved in the year preceding the concentration, on the undertaking that does not notify the concentration in terms of Article 16 of the Act.

In terms of Article 52 of the Act, deciding on the amount of fine Council of Competition takes into account intention and duration of the infringement of the Act.

According to the above mentioned, Council of Competition imposed a fine on the undertaking "OPTIMA Grupa" amounting to KM 200.000,00, which represents app. 0,796% of the total turnover from 2008.

Starting from the indisputable fact that in this case the concentration was within the meaning of the Act, which participants were required to notify to the Council of Competition, in the proceedings it was established that the first sale agreement was concluded on 15<sup>th</sup> April 2009 since when the deadline for submission of concentration started, and it has expired without the notification being filed by "OPTIMA Grupa", as a participant to the concentration that was required to notify the concentration to the Council of Competition, although these agreements are legal basis of concentration in terms of Article 30 paragraph (1) of the Act and Article 8 of the Decision on notification and assessment of the concentration of undertakings ("Official Gazette of BiH", No. 95/06). Since undertaking "OPTIMA Group" has not filed notification of the concentration even six months after the deadline for submitting notification, the Council of Competition made a decision to initiate ex officio proceedings for assessment of the concentration No. 01-05-26-033-1-II/09.

Bearing this in mind, when determining the amount of fine the Council of Competition assessed that undertaking "OPTIMA Grupa" actually did not intend to notify the concentration, which is confirmed by the Answer to the Conclusion on initiation of the ex officio proceedings (document number: 01 -05-26-033-7-II/09 of 30<sup>th</sup> November 2009) where the undertaking "OPTIM Grupa" states that the notification of concentration has not been filed because it considered that buying and selling real estate is not subject to the provisions of the Act in terms of definition of the concentration and legal basis of concentration, and that accordingly there was no concentration.

Article 25 paragraph (1), item f) of the Act provides an opportunity for interested parties to submit to the Council of Competition a request for an opinion on any aspect of the competition, which is in practice reflected in the significant number of requests for opinions of the parties that are not sure if there is the obligation to notify the concentration or not. Undertaking "Optima Grupa" has not used this legal option, and as in this case it is not an ignorant party, but a party that has already participated in the assessment procedures of concentration before the Council of Competition directly or indirectly, through its founders and owners - undertaking NeftegazInKor, Kalančevskaja No. 11, 2nd Corps Moscow, Russian Federation (the conclusions of the Council of Competition No. 01-04-26-008-9-II/07 of 23<sup>rd</sup> May 2007, No. 01-02-26-009-7-II/07 of 23<sup>rd</sup> May 2007 and the number 01-01-26-007-26-II/07 of 23<sup>rd</sup> May 2007), the Council of Competition found that the undertaking "OPTIMA Grupa" knowingly and willfully infringed the provisions of the Act in respect of a notification of concentration, and this is also appreciated as an aggravating circumstance in determining the amount of the fine. This fact has been evaluated as an aggravating circumstance because the Council of Competition in its previous practice of determining the amount of fine always made a significant difference between the delay in submitting the notification of concentration and failure to file a notification at all, and the same practice was followed in this case.

Regarding the duration of infringement of the Act, it is important to note that Article 16 of the Act prescribes the period in which the parties to the concentration are required to submit a notification of concentration, and that Article 18 paragraph (9) of the Act states that the concentration cannot be implemented without the prior Decision confirming the compatibility of the concentration. Therefore, in this case the duration of the infringement relates to the period starting from expiration of the deadline to notify the concentration up to the moment of the final decision of the Council of Competition (Decision of the Council of Competition 01-05-26-033-22-II/09 of 23<sup>rd</sup> March 2010), meaning that the infringement of the Act lasted for about 11 months. In line with its previous practice, the Council of Competition as an additional aggravating circumstance considered the fact that the concentration in question was approved by the decision issued ex officio, not at the request of the parties, since left to the will of the party, the infringement of the Act may have lasted up to today.

In practice, specifically in the beginning of the application of the Act, the Council of Competition imposed less severe fines on the undertakings in relation to the actual fine, while through the development of competitive practices in the area of competition law in Bosnia and Herzegovina, ie the length of the application of the Act, imposed fines tend to increase, and in this case the Council of Competition found that at the time of infringement of the undertaking "OPTIMA Grupa" the Act has been in application for four years, which is enough time to be informed on the provisions thereof.

While determining the fines, Council of Competition as a mitigating factor for the economic entity "OPTIMA Grupa" assessed willingness to cooperate after the proceedings were initiated ex officio for the assessment of the concentration.

Given that the undertaking "OPTIMA Grupa" based on the Decision of the Council of Competition 01-05-26-033-22-II/09 of 23<sup>rd</sup> March 2010 paid a fine in the amount of 200.000,00 KM on 9<sup>th</sup> April 2010, and considering the shortness of the period referred to Article 62 Law on Administrative Disputes of BiH

(Official Gazette of BiH' No. 19/02, 88/07, 83/08 and 74/10), and the fact that at the time of adoption of this Decision these funds have not been recalled, in paragraph 2 of the exposition of this Decision undertaking "OPTIMA Group" was given the option of choice in terms of fine payment.

Bearing this in mind, the Council of Competition made the decision cited above in the exposition. The remainder of the disputed decision of the Council of Competition No. 01-05-26-033-22-II/09 of 23<sup>rd</sup> March 2010 remains unchanged, in terms of judgment No Uvl-80/10 of 23<sup>rd</sup> March 2010.

### **Legal remedies**

Appeal against this Decision is not allowed.

Unsatisfied party can initiate administrative dispute before the Court of Bosnia and Herzegovina within 30 days from the day of receipt of this Decision or its publication.

**President**

**Stjepo Pranjić, PhD**