



REPUBLIC OF ALBANIA
-THE COMPETITION AUTHORITY-
The Competition Commission

No.____ Prot.

Date : 10/09/2009

DECISION

No. 123, Dated 18/09/2009

“On

The imposition of a fine on the company Albanian AirLines MAK Sh.p.k”

The Competition Commission, in its meeting held on 18.09.2009, with the participation of:

- | | |
|----------------------------|------------|
| ▪ Mrs. Lindita Milo (Lati) | Chairwoman |
| ▪ Mrs. Servete Gruda | Member |
| ▪ Mr. Koço Broka | Member |
| ▪ Mrs. Rezana Konomi | Member |

Discussed the following issue :

Subject: On the infringements of procedures, as foreseen by law, in the case of concentration realized between the companies Albanian AirLines MAK Sh.p.k.and Advanced Construction Group Sh.p.k..”

Legal basis : Law No. 9121, dated 28.07.2003, titled “On the Protection of Competition”, as amended, Article 24, letter “d”, Article 74, letterss “ç” and “d, Article 73, paragraph 1, letter “b” and Decisions No. 100 and 112 of the Competition Commission.

The Competition Authority upon the conclusions of its meetings held on the dates 08, 17 and 18 September 2009, and , after reviewing the Report submitted by the Secretary General on the concentration realized through the acquisition 100% of the shares of Albanian AirLines MAK Sh.p.k. by the company Advanced Construction Group Sh.p.k., and the hearing session with the parties conducted on 26 July 2009,

NOTED THAT:

I. The parties:

The company **Albanian AirLines MAK Sh.p.k** (hereinafter referred as “**Albanian AirLines**”), in the quality of **seller**, is a limited liability company which was founded and functions in compliance with the legislation in effect in the Republic of Albania, with headquarters at the following address: Rr. Dëshmorët e 4 Shkurtit “Green Park”, K 2, Po. 19, Tirana, Albania. The company is registered with the Tirana Commercial Register with NIPT No. J61827030N.

The company **Advanced Costruction Group** (hereinafter referred as “**Advanced Costruction**”), in the quality of **buyer**, is a limited liability company which was founded and functions in compliance with the legislation in effect in the Republic of Albania, with headquarters at the following address: Rr. Dëshmorët e 4 Shkurtit “Green Park”, K 6, Po. 19, Tirana, Albania and NIPT No. K32022002F.

II. The realized transaction

On 4 July 2008, the companies Albanian AirLines MAK Sh.p.k and Advanced Construction Group Sh.p.k, have entered an agreement for the sale-purchase of 100% of the shares of Albanian AirLines MAK Sh.p.k. by the company Advanced Construction Group Sh.p.k.

The transaction, in terms of Article 10, paragraphs 1 and 2 of the Law No.9121, dated 28.07.2003, titled “On the Protection of Competition”, as amended, is considered to be a concentration.

The realized transaction meets the conditions stipulated under Article 12, paragraph 1 of the Law, and therefore should have been notified to the Competition Commission, within the deadline defined under Article 12, paragraph 2 of the Law No.9121, dated 28.07.2003, titled “On the Protection of Competition”, as amended.

III. Procedure followed

The parties have failed to notify the concentration realized within a week of the realization of the transaction, as stipulated under Article 12, paragraph 1 of Law No. 9121, dated 28.07.2003, titled “On the Protection of Competition”, as amended. The Competition Authority, having established that the parties to the transaction, in terms of Article 12, paragraph 2, of the Law meet the criteria for the notification of the realized concentration, adopted Decision No. 100, dated 03/02/2009, "On the opening of the procedure for the control of the concentration realized through the purchase of 100% of the shares of company Albania Airlines MAK Sh.p.k. by the company Advanced Construction Group Sh.p.k.

The company Albania AirLines MAK Sh.p.k. has been notified on the decision made through Requisition No. 485/6 Prot, dated 04.02.2009.

Through Requisition No. 485/7 Prot, dated 24.03.2009, the Secreteriat has informed the company Albanian AirLines MAK Sh.p.k. on the sanctions applicable in cases of

non-compliance with the legal obligation to submit complete information for the purpose of review of the concentration by the Competition Commission.

The company has declined to respond to Requisition No. 458/7 prot dated 24.03.2009, issued by the Competition Commission.

Through decision No. 112, dated 15.05.2009 “On requesting information from the company Albanian AirLines Mak Sh.p.k.”, the Competition Commission required from the company Albanian Airlines to submit information on the realized concentration. The decision was notified to the company Albanian AirLines Mak Sh.p.k through Requisition No. 485/8 Prot, dated 19 May 2009 and has been taken over by the company representatives.

However, the company that was subjected to the concentration declined to respond to the requests for information forwarded since the opening of the procedure for the control of the concentration at the initiative of the Competition Authority and on the basis of Article 59 of the Law on Competition.

On 26 July 2009, the Competition Commission, on the basis of Article 39 of the Law “On the protection of competition” organized a hearing session during which the parties expressed their claims concerning the infringements of the Law “On the protection of competition” in relation to the realized concentration. The parties required 15 days to submit their evidence. After the expiry of the granted time to date, no requisition has been submitted to the Competition Authority by the parties participating in the realized concentration.

From the evaluation of competition results that the realized concentration does not affect the competition in the market, since there is a substitution of ownership from one company to another, in different relevant product markets and for that reason, the Competition Commission has authorized the realized concentration in its meeting held on 17.09.2009 by the adoption of Decision No.122.

The Competition Commission holds that the parties participating to the transaction, i.e. the companies Albania AirLines MAK Sh.p.k. and Advanced Construction Group Sh.p.k, have violated the law by failing to notify the transaction and submit in a timely fashion the required documentation to the Competition Commission and by neglecting the legal obligation to request an authorization from the Competition Commission.

Since the realized transaction for acquisition of control over the company Albania AirLines MAK Sh.p.k by Advanced Construction Group Sh.p.k does not affect the market , in making its decision, the Competition Commission has referred only to Article 73, paragraph 1, letter “b”.

FOR THESE REASONS:

The Competition Commission, pursuant to Article 24, letter “d”, Article 73, paragraph 1, letter “a”, and Article 80 of the Law No.9121, dated 28.07.2003, titled “On the Protection of Competition”, as amended,

DECIDED:

1. To impose a fine into the company Albanian AirLines MAK SH.p.k. at the amount of 2 600 000 ALL.
2. The Tax Investigation Unit is in charge to implement the decision for the imposition of the fine, on the basis of Article 80 of the Law No.9121, dated 28.07.2003, titled “On the Protection of Competition”, as amended.
3. The Secretary General is in charge for the notification of the parties and the Tax Investigation Unit at the General Tax Directorate.

This decision takes immediate effect.

THE COMPETITION COMMISSION

Servete Gruda

Rezana Konomi

Koço Broka

(_____)

(_____)

(_____)

Member

Member

Member

Lindita Milo (Lati)

CHAIRWOMAN

MINORITY OPINION

With regard to Decision No. 123, dated 18/09/2009 “On the imposition of a fine on the company Albanian AirLines MAK Sh.p.k”, I have expressed my vote against the decision made. My vote is based on the arguments that shall be presented below.

I-Legal basis of the decision

With regard to the legal basis of the Decision No. 123, dated 18/09/2009 “On the imposition of a fine on the company Albanian AirLines MAK Sh.p.k”, I note an incongruity that regards the reference made to the decision itself, as well as within the legal basis referred. So, as legal basis serve both articles i.e. 73 and 74 that address the imposition of fines, (i) imposition of fines for minor infringements (Article 73); and (ii) imposition of fines for serious infringements (Article 74). In practice, but also in theory, it is impossible to refer to both articles in relation to an infringement occurred within the same timeframe. Even if we accept the theoretical possibility of the two types of infringements, we can not apply both articles simultaneously, because the infringements (i.e. the minor and the serious type) had to happen in a consecutive fashion, and the first occurring should had been punished for first.

In this way, it could have prevented the “lawbreaker” from committing the subsequent infringement.

-Furthermore, although for one of the infringements it is alluded that has been committed by one of the parties to the concentration, it is not explained why such infringement has no reference in the legal basis of the decision made. More specifically, although in the presentation of facts of the decision again is referred the infringement defined under Article 74, letters “ç” and “d” of Law No.9121, dated 28.07.2003, titled “On the Protection of Competition”, as amended,, in the decisionmaking section of the decision that infringement is no longer mentioned and is not explained on what basis have been rejected the claims for an infringement based on Article 74, as was observed under the presentation of facts. Based on the above it results that the pre-last paragraph of the section on the presentation of facts, on page 4 of the decision does not apply.

Concerning the company Albania Airlines it is stated that the company has realized a concentration in accordance with Article 10 of Law No.9121, dated 28.07.2003, titled “On the Protection of Competition”, as amended, and that has declined to notify the Competition Authority on such concentration within the deadline determined under Article 12 of the same law.

This fact is mentioned as the first infringement committed by this company and, in accordance with the legal basis of the object of the decision, should be addressed pursuant to Article 74 of Law No.9121, dated 28.07.2003, titled “On the Protection of Competition”, as amended. This particular infringement is no longer mentioned in the decisionmaking section of the decision.

Concerning this infringement it is sufficient the fact that it is no longer mentioned in the decision-making section, to prove that the allusion made in relation to it is not based. However, I would like to mention that in the responses provided to the Competition Authority from the company Albanian Airlines, the claim of the Secretariat that the company has committed the infringement in question has been consistently rejected. In no occasion the company Albanian Airlines admitted to have become subject to sanctions on the basis of Article 10 of Law No.9121, dated 28.07.2003, titled “On the Protection of Competition”, as amended. This fact is admitted in the text of Decision 123, as well as on the other decision authorizing the concentration.

Thus, in the last paragraph of the decision 123 is stated that “...there is a substitution of ownership over a company by another company, operating in different relevant product markets...”.

Therefore, in the presentation of facts on the company that became the object of control, there is no proof of the existence of a case of concentration, conversely, it is the opposite case, which has been repeatedly proved by the representatives of the company Albanian Airlines.

II- Concerning the sanction for the imposition of a fine on the basis of Article 73, I confirm that the company Albanian Airlines did, initially, provide the information. The addressing of this case as a concentration, done insistently by the Competition

Authority (when, on my opinion expressed in this document, as well as in the previous official meetings of the Competition Commission, this is simply a sale-purchase transaction), caused that the company declined to respond, considering that the solution of this conflict would unavoidably be done before the courts. If the court rejects our [the Competition Authority] claim, we run the risk to pay indemnity to the company.

Regarding the above, I am not in full agreement with the evaluation of the facts, as is drafted by the majority of the Commission and can not agree and disapprove of the imposed sanctions, which is a direct outcome of the aforementioned presentation of facts.

Therefore, I state my vote against the sanctions stipulated under the decision, in particular, and with the whole decision, in general.

THE COMPETITION COMMISSION

Koço BROKA
(_____)
Member