

**Analysis of the clarification published by the Public Competition Agency of the Republic of Slovenia
on 16.1.2020 in the afternoon on its website**

Notice available at: <http://www.varstvo-konkurence.si/informacije/novica/dodatna-pojasnila-v-zvezi-s-koncentracijo-podjetij-agrokor-ag-in-ardeya-global-ltd-220/> (last accessed 16/1/2020 at 5:51 PM)

Content of the Agency's clarification	Counter facts and explanations of Agrokor
<p>Further clarification regarding the concentration of Agrokor AG and Ardeya Global Ltd.</p> <p>Due to numerous media reports and comments regarding the Agency's decision in the infringement case against Agrokor d.d. and the assessment of the concentration of companies Agrokor AG and Ardeya Global Ltd., the Agency publishes additional clarifications on the subject matter.</p>	<p>Agrokor is surprised by the Agency's actions, since it would be reasonably expected from a publicly-mandated authority to refrain from public communication in cases that are not yet final and which are pending before the other competent authorities and courts procedures. At the same time, Agrokor would expect from the public authority to provide the public with comprehensive and complete information on a particular matter, including of the counter facts and arguments which are claimed by Agrokor in connection with open cases in open legal proceedings.</p> <p>According to Agrokor, the Agency thus violates Article 11 of the Regulation on Administrative Operations, and at the same time discloses to the public information which, pursuant to points 6 and 7 of the first paragraph of Article 6 of the Act on Access to Public Information, should not intervene as their disclosure could be detrimental to the completion of pending procedures.</p>
<p>The Agency leads two proceedings in relation to the merger of Agrokor AG and Ardeya Global Ltd, namely the administrative procedure (in which the Agency assesses whether the concentration in question is in compliance with the competition rules) and the misdemeanor procedure (in which the Agency fined Agrokor d.d. for failure to notify about the concentration).</p>	<p align="center">/</p>
<p>By entering into a contract whereby Agrokor AG (which is 100% owned by Agrokor d.d.) acquires a 100% interest in Ardeya Global Ltd. (which owns company Costella d.o.o.) the legal entity Agrokor d.d. was already obliged in 2016 to notify the Agency about the concentration of</p>	<p>In relation to the above, Agrokor explains that the Agency's explanation is misleading, since the Agency arbitrarily chose Agrokor d.d. as the target company of its actions, which is only one of the companies in the entire chain of companies of the former Agrokor Group.</p>

<p>companies. Agrokor d.d. should notify about the concentration within 30 days of the conclusion of the contract with the seller.</p>	<p>The chain of companies at the time of the formation of the concentration was as follows: Costella d.o.o. is 100% owned by Ardeya Global Ltd, which is 100% owned by Agrokor AG, which is 100% owned by Agrokor d.d. , which is 100% owned by Adria Group Holding BV, which is 100% owned by Adria Group BV, which is 100% owned by Agrokor projekti d.o.o, which is 100% owned by the natural person Ivica Todorić.</p> <p>From the above it follows that the Agency for the Purpose of Procedure selected a company which did not make an acquisition of a stake in Ardeya Global (this purchase was made by Agrokor AG), or a company that is not the last in the chain of companies of the former Agrokor group. On this basis, Agrokor reasonably believes that Agrokor d.d. is a target of proceedings solely for the reason that Agrokor d.d. is holder of Mercator d.d. shares. (since, by all other legally relevant criteria, the Agency's procedures should be targeted by any other company in the former Agrokor group).</p> <p>It also does not support the Agency's conclusion that any obligation for Agrokor d.d. to notify the concentration was incurred as a result of the purchase of a holding in the company Ardeya Global. Pursuant to Article 43, paragraph 5, of the Anti-Competition Act (ZPOmK-1), <i>"the concentration must be notified by a person or company acquiring control of the whole or parts of one or more companies."</i> Through the transaction, the control of Ardeya Global was acquired by the Swiss company Agrokor AG (since this company bought a stake in the target company) and not by Agrokor d.d. (who was unaware of the transaction at all and was made aware of it after more than a year from the date of the transaction). All these arguments regarding the absence of a notification obligation have been stated by Agrokor d.d. on pages 39 to page 48 of its 92 pages long request for judicial protection from 8.11.2019, which the Agency completely ignored in its public announcement.</p>
<p>Since the legal entity Agrokor d.d. (despite the Agency's invitation) did not notify about the concentration of companies concerned, on 9. 4.</p>	<p>Agrokor has responded extensively to the Agency in response to its letters and requests for clarification, namely:</p>

2019 an administrative procedure for the assessment of compliance of the concentration with the competition rules has been instituted ex officio by the Agency.

- on 10.12.2018, Agrokor responded to the Agency's request of 8.11.2018, explaining in detail the circumstances of the specific case (also that control over Ardeya Global was acquired by Agrokor AG; that Agrokor d.d. has no control over Agrokor AG as company Agrokor AG is under the compulsory administration of a manager and a Swiss court; that Agrokor d.d. does not even have specific information about concentration; etc.) and called on the Agency to contact Agrokor AG for clarification;
- on 26.4.2019 Agrokor responded to the decision to initiate the Agency procedure of 9.4.2019. In its reply, it reiterated the circumstances of the specific case and reiterated its request to the Agency to contact the Swiss company Agrokor AG regarding the concentration between Agrokor AG and Ardeya Global;
- on 20.5.2019, Agrokor again replied to the Agency's letter of 13.5.2019, by which the Agency also forwarded to him a translated decision initiating the procedure. Agrokor again suggested that the Agency contacts Agrokor AG;
- on 11.6.2019, Agrokor responded to the offense notice and in its 7-page detailed statement, called on the Agency to address Agrokor's allegations that Agrokor did not even know about the transaction between Agrokor AG and Ardeya Global, to former management of the companies Agrokor d.d. and Agrokor AG, including Mr. Ivica Todorić. The Agency did not conduct the hearings, even though Agrokor suggested that the hearings relate to key facts, which, in violation of all the procedural rights of Agrokor, were considered by the Agency without any basis to be proven;
- on 8.8.2019, Agrokor responded to the request to provide information of 5.7.2019 (Agrokor received it for some unknown reason only on 23.7.2019), explaining in its respond to the Agency that Agrokor did not have all the requested information and that the Agency should contact Agrokor AG regarding this information;
- instead of contacting Agrokor AG for clarification (which, according to Agrokor d.d., has not been done by the Agency to this day), the Agency has continued to

	<p>harass Agrokor d.d. with the requests that could not be filled objectively by Agrokor d.d. (as it simply did not have the information). Agrokor d.d. nevertheless, on 9.10.2019 and 12.11.2019, has provided the Agency with the explanations it could, and on the remaining explanations again asked the Agency to contact Agrokor AG.</p>
<p>In order to properly assess the effects of a concentration on the relevant markets, the Agency needs a lot of information, which they obtain from various market participants, therefore also from Agrokor d.d. The Agency has repeatedly requested information and explanations from Agrokor d.d., which, despite the fine of € 40,000, has still not been fully provided by them (Agrokor d.d. has already paid the fine for not providing the data). The Agency has therefore not yet carried out or concluded an assessment of the effects of the concentration in question.</p>	<p>The Agency fined Agrokor in the amount of € 40,000 despite the fact that</p> <ul style="list-style-type: none"> (i) Agrokor responded each time to the Agency's letters and requests; (ii) the Agency even changed its request (what they want from Agrokor d.d. at all) from 11.9.2019 to 2.10.2019, since it clearly found that Agrokor could not provide the Agency with what they requested by then; (iii) Agrokor has made every effort to make Agrokor AG provide the Agency with the requested information (in this regard, intensive discussions have taken place between the legal advisers of the two companies since July 2019, however, despite objections from Agrokor d.d., Agrokor AG refused to provide the Agency with information); and (iv) on 9.11.2019 Agrokor AG also actually provided the Agency with a notification form. <p>Whereas the Agency infringed a number of administrative provisions in imposing a fine of € 40 000; whereas it has misapplied substantive law; whereas in the determination of the amount of the penalty it acted in a completely arbitrary manner; and because it erroneously established the actual situation; On 29.11.2019 Agrokor filed with the Administrative Court of the Republic of Slovenia a lawsuit in an administrative dispute that has not yet been decided.</p>
<p>The Agency explains that if a company does not notify the Agency about the concentration or does not notify it within the deadline, it commits an offense under Article 74 of the ZPOmK-1, for which a fine of up to ten percent of the annual turnover in the previous financial</p>	<p>The Agency's claim that breach of the provisions of the ZPOmK-1 relating to the obligation to notify about the concentration to the Agency are independent of the effects of the concentration on the relevant market, is not true. In accordance with Article 26 of the</p>

<p>year in the concentration of the participating company, together with other companies in the group, is prescribed. Breach of the provisions of the ZPOmK-1 relating to the obligation to notify about the concentration to the Agency are therefore independent of the positive or negative decision on concentration in the administrative procedure or of the effects of the concentration on the relevant market.</p>	<p>Misdemeanors Act (ZP-1), the Agency must also take into account the gravity of the alleged misdemeanor and the perpetrator's guilt when selecting a sanction and imposing a fine. In accordance with the second paragraph of the cited article, the Agency must take into account all circumstances that influence whether the sanction should be lower or greater (mitigating and aggravating circumstances), including the level of threat or violation of the protected property and the circumstances in which it was offense committed.</p> <p>If the notified concentration is not prohibited; or if the concentration does not have any effect on the relevant market; the gravity of the offense committed is certainly significantly less than if it had not been for the notified concentration which would be prohibited or the concentration which could actually have an effect on the relevant market. It is also well-known in the case of concentrations not prohibited, that have no effect on the relevant markets, and the level of threat to the protected good is also lower.</p> <p>Last but not least, all the circumstances (therefore also the effects of the non-notified concentration on the relevant market) must be taken into account when assessing whether the grounds for a reprimand or warning have been given in connection with the alleged offense.</p> <p>Agrokor challenges all these erroneous beliefs of the Agency by relying on a number of legal and factual arguments with its request for judicial protection of 8.11.2019, which has not yet been decided.</p>
<p>Due to the fact that the concentration in question was not notified to the Agency, the Agency instituted misdemeanor proceedings and gave Agrokor d.d. imposed a fine of € 53,900,000. The amount of the fine for such offenses depends on the sales revenue generated by the concentration of the company involved, which should have notified the concentration and committed the infringement, together with other companies in the group (in this case, the annual turnover of the Agrokor Group), and not the annual turnover of the</p>	<p>Agrokor already states above what the Agency should consider when choosing a sanction and assessing the amount of the fine. Thus, the Agency's contention that the amount of the fine is dependent on the revenue in the concentration of the companies involved is not true, as the amount of the fine depends on many other elements. The annual turnover of the target company (which in the specific case at the time of the transaction was just over € 1 million) is certainly one of the relevant elements for determining the amount of the</p>

<p>target company, which is in this case Ardeya Global Ltd. together with company Costella, or transaction value.</p>	<p>fine, since the amount of annual turnover of the target company influences the assessment of the gravity of the offense committed. The Agency's explanation is therefore misleading and legally incorrect, and Agrokor also challenges the imposition of the fine by its request for judicial protection of 8.11.2019.</p>
<p>As there is a fear and high probability that the fine imposed will not be enforced, the Agency used the institute to enforce the decision on the offense, by which the Agency temporarily seized the ordinary (regular) shares of Mercator d.d. Of the legal entity Agrokor d.d. The Agency decided to use the Institute in order to achieve the basic purpose of imposing sanctions for misdemeanors (i.e. enforcement of sanctions). The temporary seizure of all the shares did not lead to a disproportionate interference with the right to private property and the right to free economic initiative, since given the day-to-day fluctuations in the value of the shares it is impossible to predict the value they will have when the decision on the offense becomes final. In addition, the Agency did not become, and will not become, the owner of Mercator d.d. by temporarily seizing the shares, since the (limited in time) temporary suspension of the shares is intended solely to secure the enforcement of the decision on the offense. The aforementioned decision of the Agency was also fully agreed by the competent court.</p>	<p>In the explanatory note, the Agency confirms Agrokor's claims that the Agency used a temporary insurance measure past the legal text of the fifth paragraph of Article 201 of the Misdemeanors Act. In its notice, the Agency refers to "the fear and the great danger that the fine imposed will not be enforced", but the legal text refers to the fear that the offender would escape or hide unknown where. The Agency has not shown in any fact that Agrokor would have escaped the execution of the fine before executing the fine (not because it believes that it will succeed with its request for judicial protection and that the misdemeanor decision will be annulled and the misdemeanor proceedings will be stopped) therefore, in imposing a temporary insurance measure, the Agency simply made up such conditions, which in this case suited her.</p> <p>As such behavior by the Agency and state bodies is dangerous, and the misuse and incorrect application of the said legal provision is so obvious, Agrokor will use all available national and international legal remedies against the decision on temporary insurance and against the decision of the Ljubljana District Court.</p>
<p>The Agency therefore urges all companies to timely notify about concentrations of companies subject to the provisions of ZPOmK-1 to the Agency, thereby enabling the Agency to effectively exercise its powers, as any offense identified by the Agency will be properly sanctioned.</p>	<p>Such a call by the Agency clearly demonstrates that the Agency pursues objectives against Agrokor that it should not pursue in individual cases. The Agency has chosen company Agrokor as a target in which it seeks to create practice in various areas of its work, and in doing so, to the detriment of Agrokor, it has crossed the boundaries of legality and constitutionality with each of its decisions in Agrokor's cases.</p>