The Autorité cleared the acquisition, subject to conditions, of Cayenne supermarket Super NKT

Published on September 27, 2019

The Autorité de la concurrence cleared the acquisition, subject to conditions, of the company NDIS and its subsidiary NG Kon Tia by SAFO (Huyghues-Despointes Group), which will be conditional on a divestiture prior to the acquisition of the wholesaler-importer business.

Background

On 8 July 2019, Société Antillaise Frigorifique (SAFO) notified the Autorité de la concurrence of its acquisition of NDIS and its subsidiary NG Kon Tia, both active in the food retail sector in French Guiana.

At the end of the investigation, which led the Autorité to consult a large number of operators in the sector (retailers, wholesalers, suppliers), the Autorité cleared the transaction, subject to structural and behavioural commitments, some of which will have to be implemented before the completion of the operation.

The commitments presented by SAFO allow an independent hypermarket brand in French Guiana to continue operating and thus to preserve a diversity of offer for the consumers.

The also allow not to strengthen SAFO's position in the food and non-food wholesale markets in French Guiana.

SAFO will have, before completing the transaction, to sell NG Kon Tia's wholesaler-importer business and obtain the agreement of its buyer, in order to ensure that it is able to maintain sufficient competition. It is the first time that the Autorité sets up this type of remedy on a so-called « up-front buyer » prior sale.

Parties to the transaction

The company SAFO, controlled by the Huyghues-Despointes family, is active in the predominantly food retail sector in the French Antilles-French Guiana region and in mainland France. In French Guiana, SAFO operates a Carrefour Market located in Rémire-Montjoly, near Cayenne (973) and conducts an affiliate management business under Proxi sign license agreements and franchise agreements 8 à Huit (Carrefour Group). In addition, SAFO is active in the food and non-food wholesale and semi-wholesale sector through its subsidiaries Sofrigu and Rémidis.

NDIS, controlled by the NG Kon Tia family, operates a hypermarket under the brand Super NKT, located in Cayenne (973). Through its subsidiary NG Kon Tia, NDIS is also active in the food and non-food wholesale sector. Finally, NG Kon Tia owns a commercial real estate complex.

Identified competition risks

After realising a detailed examination of the effects of the transaction and consultation with numerous operators in the food retail sector in French Guiana, the Autorité identified risks of harm to competition.

Two main risks to competition were identified in the food and non-food retail and wholesale markets in French Guiana.

- *The transaction would have entailed a risk of a hypermarket brand in French Guiana disappearing*

In the catchment area affected, three independent hypermarket brands are currently present: Super NKT, Carrefour (Groupe GBH) and Hyper U. The SAFO group now benefiting from a brand and sourcing agreement with the Carrefour group, operating the Super NKT store under the Carrefour brand would have resulted in a reduction in the number of competing brands in the area from three to two, with the consumer therefore losing an alternative for their shopping in an already highly concentrated French Guianese market.
In a wider market, which includes all forms of retail (supermarkets, convenience stores), the transaction could also strengthen the already prominent position of the Carrefour brand and eliminate an independent brand.

- *SAFO's market shares in the wholesale markets could have been strengthened by the acquisition of NG Kon Tia*

Particular attention was paid to the wholesale distribution of fresh products (yoghurt, butter, cream desserts, fruit, vegetables, etc.) and frozen products from Sofrigu (SAFO) and NG Kon Tia (NDIS) in French Guiana, intended for the retail sector in particular. As part of the various market tests (consultation of market stakeholders) carried out during the investigation, several operators in the sector indicated that Sofrigu and NG Kon Tia were the two main wholesaler-importers for these product categories in French Guiana, and they worried about the consequences of the transaction, particularly in terms of the conditions under which they would access these products for their activity.

Commitments

- *SAFO will operate the hypermarket acquired under a brand that does not include the Carrefour brand*

In order to remedy the risk of the harm to competition resulting from the disappearance of an independent retailer, SAFO has made a commitment not to run the hypermarket under one of Carrefour's brands. The contracts that will be signed between SAFO and Carrefour Group must grant the hypermarket commercial independence, both in terms of product range and pricing policy, that the other stores operating under Carrefour brands in French Guiana (Carrefour, 8 à Huit and Proxi) do not have. These provisions will in particular enable SAFO Group to compete effectively with Carrefour Group in French Guiana insofar as it will be able to freely determine its commercial strategy with regard to its master franchisor.

This commitment will therefore enable SAFO to effectively compete, in respect of price, quality and the range of products on sale, with the Carrefour and Hyper U hypermarkets present in the catchment area, and more generally with all the competing food retailers in French Guiana.

A commitment of the same nature aiming at preserving the diversity of the brands for the consumer, had been accepted by the Autorité de la concurrence in its decision 18-DCC-142 regarding the acquisition of Géant Casino hyper in the city of Le Robert in Martinique by Groupe Bernard Hayot.

- *SAFO undertakes to sell NG Kon Tia's wholesaler-importer business as part of a prior sale commitment (“up-front-buyer”).*

SAFO has committed not to carry out the transaction until it has divested NG Kon Tia's entire wholesaler-importer business and obtained the Autorité's approval on this sale. The Autorité will notably determine if the buyer of the

business is able to maintain competition. Under competition law, this is an upfront divestiture commitment (or “up-front-buyer”) which offers a high guarantee of effectiveness in its implementation insofar as the transaction cannot be carried out until the buyer of the assets transferred is approved, that is, until the Autorité has ensured that the buyer has all the guarantees required for the takeover (independence, continuation of activity).
The completion of the transaction is thus subjected to these two conditions.

The upfront divestiture procedure (up-front-buyer): an additional guarantee of the effectiveness of the structural remedy undertaken

The structural commitment undertaken by SAFO in response to the risk of harm to competition identified in the food and non-food wholesale markets is an up-front-buyer commitment.

This is a specific type of commitment provided for in paragraph 590 of the Autorité de la concurrence's merger control guidelines. The procedure limits the risk of transfers of shares that would experience particular difficulties, unknown to the Autorité, and which would make performing the transfer difficult.

This is the first time that the Autorité de la concurrence has accepted such a commitment.

The European Commission, for its part, had already accepted such commitments on several occasions, notably in the context of the case M.7567 regarding the acquisition of the cans producer Ball by its competitor Rexam in 2016.

The Autorité's proposals on the competitive risks of wholesaler-importers' vertical integration

In its opinion 19-A-12 on the operation of competition in overseas distribution, the Autorité had in particular highlighted the importance of competition issues in relation to wholesaler-importers, particularly if they are vertically integrated with distribution groups.

The Autorité had indeed noted that a non-negligible share of the overseas distribution groups is indeed also present as wholesaler-importers in the wholesale market. She pointed out the competitive risks of this vertical integration (presence of an actor at the different levels of the chain), in particular in the allocation of commercial cooperation budgets (tariff advantages granted by the supplier to the distributor for the promotion of its products in stores or catalogues). An integrated player can indeed be encouraged to favour its brands at the expense of its competitors. The Autorité has therefore recommended strengthening the rules applicable to the overseas territories to prevent the discrimination of actors in the event of vertical integration.

> > See full text of the decision 19-DCC-180 of 27 September 2019

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