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PUBLIC VERSION

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus […]. Where possible the information omitted has been replaced by ranges of figures or a general description.

CVC Capital Partners SICAV-FIS S.A.
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Subject: **Case M.10578 – CVC / EKATERRA**
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004[1] and Article 57 of the Agreement on the European Economic Area[2]

Dear Sir or Madam,

(1) On 12 April 2022, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which CVC Capital Partners SICAV-FIS S.A. ("CVC" or the "Notifying Party", Luxembourg) acquires sole control of ekaterra B.V. ("ekaterra", Netherlands) (together referred to as the "Parties") under the meaning of Article 3(1)(b) of the Merger Regulation (the "Transaction").[3]

[1] OJ L 24, 29.1.2004, p. 1 (the 'Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

[2] OJ L 1, 3.1.1994, p. 3 (the 'EEA Agreement').

[3] Publication in the Official Journal of the European Union No C 170, 25.04.2022, p. 11.

1. THE PARTIES

(2) CVC and its subsidiaries manage investment funds which hold interests in a number of companies active in various industries. Zabka Polska ("Zabka") is one of the portfolio companies controlled by CVC and is active in the retail distribution of consumer goods in Poland, through a franchise network of approximately 8,000 convenience stores.

(3) Ekaterra is an indirect wholly owned subsidiary of Unilever PLC ("Unilever"), which carries out a tea business consisting of the cultivation, processing and supply of leaf tea, the researching and developing, manufacturing, producing, packaging, packing, marketing, distributing and selling of tea products worldwide.[4]

2. THE CONCENTRATION

(4) For the purpose of the Transaction, the Parties have set up a special purpose vehicle (Puccini Bidco B.V., "Puccini") which is indirectly solely controlled by CVC. According to the Share Purchase Agreement ("SPA") entered into between Puccini and Unilever on 18 November 2021, Puccini is to acquire the entire issued share capital of ekaterra. As a result, CVC will indirectly acquire (i.e. through Puccini) sole control of ekaterra, which amounts to a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

3. UNION DIMENSION

(5) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million[5]. Each of them has a Union-wide turnover in excess of EUR 250 million, but they do not achieve more than two-thirds of their aggregate Union-wide turnover within one and the same Member State. The notified operation therefore has a Union dimension.

4. MARKET DEFINITIONS

(6) The Transaction does not give rise to any horizontal overlap between the Parties' activities but gives rise to vertical relationships between ekaterra's activities on the markets for the production and supply of branded tea to modern trade retailers in Poland (upstream) and CVC's activities (through Zabka) on the markets for the retail distribution of daily consumer goods in Poland (downstream).

4.1. Product markets

4.1.1. Production and supply of tea

4.1.1.1. The Commission's past practice

(7) The Commission has not yet investigated specifically the market for the production and supply of tea. In previous decisions, however, the Commission distinguished

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[4] Excluding India, Indonesia and Nepal. The perimeter of the Transaction does neither include Unilever's interests in the PepsiLipton joint ventures with Pepsico in relation to ready-to-drink ("RTD") tea.

[5] Turnover calculated in accordance with Article 5 of the Merger Regulation.

between the production and supply of alcoholic beverages and non-alcoholic beverages.[6]

(8) Within non-alcoholic beverages, the Commission made a further distinction between ready-to-drink beverages and other ingredients that require brewing, such as coffee.[7]

(9) The Commission also considered a further segmentation by distribution channel, with a distinction between supply to out-of-home ("OOH") outlets, such as restaurants and hotels, and supply to retail outlets.[8] Finally, with respect to coffee, the Commission contemplated but ultimately rejected a further segmentation between branded and private label products.[9]

4.1.1.2. The Notifying Party's view

(10) The Notifying Party considers that the relevant product market is the market for the production and supply of tea, which should be distinguished from alcoholic beverages and other non-alcoholic beverages.[10] The Notifying Party further considers a segmentation between brewed tea and ready-to-drink tea is relevant.[11]

(11) In contrast, the Notifying Party considers that the market should not be further segmented (i) between brands and private labels[12], (ii) according to the type of tea (i.e. black tea, green tea, herbal tea, fruit tea, tisanes) or (iii) according to formats (i.e. tea bags, loose tea, capsules).[13]

4.1.1.3. The Commission's assessment

(12) As to the existence of a separate market for the production and supply of tea, retailers refer to tea as a distinct category[14] which is of specific importance in Poland due to the specific taste of Polish consumers for tea.[15] This is also consistent with the Parties' internal documents […].[16]

(13) As to potential segmentations within the production and supply of tea, the results of the market investigation suggest that distinctions by type of tea (black or green tea) and formats (bags or loose tea), as well as segmentations by distribution channel or between private labels and branded tea, are relevant.

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6 COMP/M.2268 – *Pernod Ricard/Diageo/Seagram* Spirits, COMP/M.2276 – *The Coca-Cola Company/Nestlé/JV*, COMP/M.2504 – *Cadbury Schweppes/Pernod Ricard*, COMP/M.3182 – *Scottish & Newcastle/Hp Bulmer*, COMP/M.5114 – *Pernod Ricard/V&S*, COMP/M.7292 – *Demb/Mondelez/Charger Opco*, COMP/M.9369 - *Pai Partners/Wessanen*.

7 Case M.9122 - *TCCC / COSTA*.

8 Case M.5560 – *Carlsberg Deutschland/Nordmann/JV Nordic Getränke*.

9 Case M.7292 –*DEMB / Mondelez / Charger Opco*.

10 Form CO, para 76.

11 Form CO, para 77. Ekaterra does not sell RTD tea as the perimeter of the Transaction does not include Unilever's interests in the PepsiLipton joint ventures.

12 Form CO, paras. 96-99.

13 Form CO, paras. 89-95.

14 See for instance the non-confidential minutes of a conference call with a retailer held on 30 March 2022 and non-confidential minutes of a conference call with a retailer held on 27 April 2022.

15 Non-confidential minutes of a conference call with a retailer held on 24 March 2022.

16 Form CO, annex 8.

(14) Even if a majority of retailers considers there are no major differences between the conditions of supply of any types or formats of tea to retailers, they consider that characteristics of tea (colour or format) are important in driving customers' choices.[17] As explained by a retailer "*There are no differences in purchasing for different types of teas, but there are differences in the level of demand for individual types of teas from retail (shop) customers*."[18]

(15) Similarly, from a supply-side perspective, some tea players in Poland are only active in specific segments of tea: Herbapol, for example, is the market leader in fruit and herbal tea but does not have a black tea offering. Large-scale entry in the segment of black tea also appears to be challenging. As explained by one competitor "*In black teas, it is very difficult to build an effect of scale in the sale of a new product and brand. It also requires large investments in modern machinery and marketing expenditure on building the brand identity*".[19]

(16) Furthermore, the Commission notes that when the Parties refer to tea in their internal documents, […], as shown in the graphs below:

[...]

(17) Likewise, […].[20]

(18) Moreover, several national competition authorities have previously defined a market for the production and supply of tea, with a distinction between black tea, green tea, flavoured tea and infusions/health tea.[21]

(19) In addition, the limited penetration rate of private label tea in Poland, which accounts for only 17% of the total retail sales of tea in value, and the importance of some brands that are considered by retailers as must-carry (see below competitive assessment) suggests that private label tea exerts little competitive pressure on branded tea.[22]

(20) In any event, potential segmentations by type of tea, by format, by distribution channel and between branded tea and private label tea can be left open as the Transaction does not give rise to competition concerns under any plausible product market definition. In the case at hand, the Commission will assess the Transaction under the narrowest plausible product market definition (where ekaterra's upstream market share is the highest), i.e. the market for the production and supply of branded tea to modern trade retailers with a distinction by type of tea and by format.

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17 Questionnaire to retailers, non-confidential response to question 6.1.

18 Questionnaire to retailers, non-confidential response to question 6.1.

19 Questionnaire to competitors, non-confidential response to question 11.2.

20 Form CO, Annex 8.

21 See e.g.: the French Competition Authority's decision in Case No. 16-DCC-21 - *Phoenix Beverages Limited/GML Investissement LTEE/Société pour l'Exploitation et le Développement des Eaux de Sources* and the Slovenian Competition Authority's decision in Case No. 3061-11/2013 - *Atlantic Trade d.o.o./Prodis d.o.o.*

22 Form CO, para. 119. The presence of must-carry brands (brands that retailers need to carry because otherwise they would lose substantial sales of the category) is a factor that led to a distinction between brands and private label in previous cases, see for example: Case M. 5046 - *Friesland Foods / Campina* (as regards dairy drinks and deserts).

4.1.2. Retail distribution of daily consumer goods

4.1.2.1. The Commission's past practice

(21) In its previous practice, the Commission defined a distinct market for the retail provision of daily consumer goods, including dry food-stuffs and non-food household consumables sold in a supermarket environment.[23]

(22) Within this market, the Commission contemplated a further segmentation between specialised stores on the one hand, and hypermarkets, supermarkets and discount chains, on the other hand.[24] With respect to Poland, in particular, the Commission has also contemplated distinguishing a separate market for small retailers, including convenience stores located at fuel stations and kiosks, to the exclusion of hypermarkets, supermarkets and discount stores.[25]

4.1.2.2. The Notifying Party's view

(23) The Notifying Party does not contest the product market definition set out by the Commission in its precedents.

4.1.2.3. The Commission's assessment

(24) In the case at hand, the Commission does not see any reason to depart from its previous decisional practice. In any event, the question whether the market for retail distribution of daily consumer goods is segmented between hypermarkets, supermarkets, discount chains, on the one hand, and specialised stores or small retailers, on the other hand can be left open, as the Transaction does not give rise to competition concerns under any plausible market definition.

(25) For the purpose of this Decision, the analysis will be conducted based on the narrowest possible product segments (on which Zabka's market share is the highest), i.e. the market for the retail distribution of daily consumer goods in small retail stores[26] to the exclusion of hypermarkets, supermarkets and discount stores.

4.1.3. Procurement of daily consumer goods

4.1.3.1. The Commission's past practice

(26) In previous decisions, the Commission has considered a market for the procurement of daily consumer goods, distinct from the retail distribution market.[27] In these decisions, the Commission considered that procurement of different categories of products may constitute separate markets[28] (*e.g.*, procurement of basic foodstuffs, procurement of wine and spirit drinks). The Commission also

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23 Case M.803 – *Rewe / Billa* ; Case M.914 – *Tesco / ABF*.

24 Case M.784 – *Kesko / Tuko*; Case M.803 – *Rewe / Billa*; Case M.914 – *Tesco / ABF*; Case M.1221 – *Rewe / Meinl*; Case M.1832 – *Ahold / ICA Förbundet / Canica*; Case M.3905 – *Tesco / Carrefour (Czech Republic and Slovakia)*; Case M.4590 – *Rewe / Delvita*; Case M.5790 – *Lidl / Plus Romania / Plus Bulgaria*; Case M.9495 – *Fortenova Grupa / Poslovni Sistemi Mercator*.

25 Case M.9561 – *PKN ORLEN / RUCH*, para. 14; Case IV/M.784 - *Kesko/Tuko*, paragraph 20.

26 Including convenience stores located at fuel stations and kiosks.

27 COMP/M.1221 – *Rewe / Meinl*; COMP/M.9495 – *Fortenova Grupa / Poslovni Sistemi Mercator*.

28 In M.7933 – *Carrefour / Billa Romania*, the Commission also considered a different segmentation of the procurement market for daily consumer goods into 23 product categories.

previously considered, but ultimately left open, whether a further distinction should be made between different sales channels, such as food-retailing, specialised trade, delicatessen, cash and carry stores and other wholesalers drugstores and export trade.[29]

4.1.3.2. The Notifying Party's view

(27) The Notifying Party does not contest the product market definition set out by the Commission in its precedents.

4.1.3.3. The Commission's assessment

(28) In the case at hand, the Commission does not see any reason to depart from its previous decisional practice. In any event, the questions whether the procurement of different categories of products (e.g. basic foodstuffs, wine and spirit drinks, etc.) or the different sales channels (e.g. food retailing, specialised trade, etc.) belong to separate markets can be left open, as the Transaction does not give rise to competition concerns under any plausible market definition.

(29) For the purpose of this decision, the analysis will be conducted on the segment for the procurement of daily consumer goods by modern trade retailers, where Zabka's market share is higher than for the tea category.

4.2. Geographic markets

4.2.1. Production and supply of tea

4.2.1.1. The Commission's past practice

(30) As explained above, the Commission has not yet defined a separate market for the production and supply of tea. In its precedents, however, the Commission has defined the markets for non-alcoholic beverages as national in scope.[30]

4.2.1.2. The Notifying Party's view

(31) The Notifying Party agrees that the potential tea markets, like other fast-moving consumer goods, are likely to be national in scope.

4.2.1.3. The Commission's assessment

(32) The results of the market investigation confirmed the relevance of a national market for the production and supply of tea in Poland. A large majority of customers indicated that they purchase tea at national level.[31] In this respect, one retailer explained for instance that '[it] *purchases branded tea mostly on the national level, in order to supply* [Confidential] *stores in Poland*'.[32] In addition, the Commission notes that […].[33]

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29 COMP/M.1221 – *Rewe / Meinl*; COMP/M.9495 – *Fortenova Grupa / Poslovni Sistemi Mercator*.
30 COMP/M.2268 – *Pernod Ricard / Diageo / Seagram Spirits*; COMP/M.7178 – *Suntory / Beam*.
31 Questionnaire to retailers, non-confidential response to question 4.
32 Questionnaire to retailers, non-confidential response to question 4.1.
33 Form CO, Annex 8.

(33) In view of the above, the Commission takes the view that the market for the production and supply of tea in Poland is likely to be national in scope. In the case at hand, the Commission will assess the competitive effect of the Transaction on the national market for the production and supply of branded tea to modern trade retailers in Poland, with a further distinction by type of tea and by format.

4.2.2. Retail distribution of daily consumer goods

4.2.2.1. The Commission's past practice

(34) In previous decisions, the Commission considered the markets for the distribution of daily consumer goods to be local, with a radius of 20 to 30 minutes by car.[34] In Poland in particular, the Commission has contemplated the definition of local markets, extending to a 1-kilometer radius around each store.[35]

4.2.2.2. Notifying Party's view

(35) The Notifying Party does not contest these market definitions.

4.2.2.3. The Commission's assessment

(36) In the case at hand, the Commission does not see any reason to depart from its previous decisional practice. In any event, the exact scope of the relevant geographic market for the retail distribution of daily consumer goods, i.e. the exact geographic scope of the catchment areas, can be left open, as the Transaction does not give rise to competition concerns under any plausible geographic market definition. In the case at hand, the Commission will assess the Transaction under the narrowest and most conservative plausible geographic market definition, i.e. the local market for the retail distribution of daily consumer goods at the commune (*gmina*) level in Poland.

4.2.3. Procurement of daily consumer goods

4.2.3.1. The Commission's past practice

(37) From a geographic point of view, the Commission has considered the markets for the procurement of daily consumer goods to be national in scope.[36]

4.2.3.2. The Notifying Party's view

(38) The Notifying Party does not contest these market definitions.

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[34] With the exact length of time depending on the specific market being examined. See e.g.: Case M.784 – *Kesko / Tuko*; M.1684 – *Carrefour / Promodes*; Case M.1832 – *Ahold / ICA Förbundet / Canica*; Case M.3464 – *Kesko / ICA / JV*; Case M.3905 – *Tesco / Carrefour (Czech Republic and Slovakia)*.

[35] Case M.9561 – *PKN ORLEN / RUCH*, para. 17.

[36] COMP/M.1221 – *Rewe / Meinl*; COMP/M.1684 – Carrefour / Promodes; CMP/M.1832 - *Ahold / ICA Förbundet / Canica*.

4.2.3.3. The Commission's assessment

(39) In the case at hand, the Commission does not see any reason to depart from its previous decisional practice and considers that the procurement of daily consumer goods is national in scope.

5. COMPETITIVE ASSESSMENT

(40) Ekaterra sells branded tea in Europe, including in Poland where one of CVC' sportfolio companies* is active in the retail distribution of daily consumer goods (Zabka). Accordingly, the Transaction gives rise to vertical relationships between:

(a) ekaterra's activities on the markets for the production and supply of branded tea to retailers in Poland (upstream), notably under the Lipton and Saga brands (ekaterra does not sell private label tea);

(b) Zabka's activities on the market for the retail distribution of daily consumer goods in Poland (downstream).

5.1. Legal framework

(41) Pursuant to Article 2(2) and (3) of the Merger Regulation, the Commission must assess whether a concentration would significantly impede effective competition in the internal market or in a substantial part of it, in particular through the creation or strengthening of a dominant position. In this respect, a merger can entail horizontal and/or non-horizontal effects.

(42) With particular regard to non-horizontal effects, a merger can entail such effects when it involves companies operating at different levels of the same value chain or in closely related markets.

(43) In assessing potential vertical effects of a merger, the Commission analyses, among others, whether the merger results in foreclosure so that actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing those companies' ability and/or incentive to compete.[37] Such foreclosure may discourage entry or expansion of rivals or encourage their exit. Foreclosure thus can be found even if the foreclosed rivals are not forced to exit the market. It is sufficient that the rivals are disadvantaged and consequently led to compete less effectively. Such foreclosure is regarded as anti-competitive where the merging companies — and, possibly, some of their competitors as well — are as a result able to profitably increase the price charged to consumers.

(44) The Non-Horizontal Merger Guidelines distinguish between two forms of foreclosure: (*i*) input foreclosure, when access of downstream rivals to supplies is hampered;[38] and (*ii*) customer foreclosure, when access of upstream rivals to a sufficient customer base is hampered.[39]

(45) In assessing both types of foreclosure, the Commission assesses whether the merged entity (*i*) would have the ability to engage in foreclosure, (*ii*) whether it

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* Should read: 'CVC Funds' Portfolio Companies'

37 Non-Horizontal Merger Guidelines, paras. 20-29.

38 Non-Horizontal Merger Guidelines, para. 31.

39 Non-Horizontal Merger Guidelines, para. 58.

would have the incentive to do so, and (*iii*) what would be the overall impact on effective competition in the affected markets.

(46) The present Section 5 assesses whether the Transaction is likely to raise vertical non-coordinated effects on the markets examined in Section 4.

5.2. The Commission's assessment

(47) In light of the above, this Decision will first provide an overview of the Parties' market shares (5.2.1) and will examine successively the risks of input foreclosure (5.2.2) and customer foreclosure (5.2.3).

5.2.1. Market shares

(48) Table 1 outlines the Parties and their competitors' market shares on the overall upstream market for the production and supply of tea in Poland and on the overall downstream market for the retail distribution of daily consumer goods in Poland in 2020.[40] Downstream market shares are provided at national level as the Notifying Party was not able to provide local market shares. However, the Notifying Party confirmed that Zabka's market share for the retail distribution of daily consumer goods would not exceed [30-40]% at local level, considering in particular the commune (gmina) level.

Table 1 – Market shares: overview

2020	UPSTREAM		DOWNSTREAM
	Production and supply of branded tea - Modern trade (Poland)		Retail distribution of daily consumer goods in convenience stores[41] (Poland)
	Value (€)	*Volume*	*Value (€)*
CVC	-	-	[10-20]%
Ekaterra	[30-40]%	[30-40]%	-
Combined	***[30-40]%***	***[30-40]%***	***[10-20]%***
Competitor 1	Herbapol: [10-20]%	Herbapol: [10-20]%	ABC: [20-30]%
Competitor 2	Mokate: [5-10]%	Mokate: [10-20]%	Nasz sklep: [5-10]%
Competitor 3	Dilmah: [0-5]%	Dilmah: [0-5]%	Lewiatan: [5-10]%

Source: Form CO, Tables 3 and Annex PN RFI 4 Q2.1

[40] The market shares of the Parties both at the upstream and downstream levels for those markets remained stable over the last three years. Ekaterra's value market share in the upstream market for the production and supply of branded tea to modern trade retailers in Poland was [40-50]% in 2018 and [40-50]% in 2019, and Zabka's market share in the retail distribution of daily consumer goods in convenience stores in Poland remained below [20-30]% in 2018 and 2019 (see the Notifying Party's response to RFI 6).

[41] Small format grocery retail with a net sales are of less than 300m^2, including petrol stations and kiosks but excluding supermarkets, hypermarkets and discounters.

(49) In addition, the tables below provide ekaterra and its main competitors' market shares for the production and supply of branded tea in Poland, with a distinction by type of tea, for 2020, 2019 and 2018:

Table 2 – Production and supply of branded tea: distinction by type (2020)

2020	Black tea		Green tea		Fruit and herbal infusions	
	Value	*Volume*	*Value*	*Volume*	*Value*	*Volume*
Ekaterra	**[50-60]%**	**[50-60]%**	**[20-30]%**	**[10-20]%**	**[10-20]%**	**[5-10]%**
Comp. 1	Mokate: [10-20]%	Mokate: [20-30]%	Herbapol: [30-40]%	Herbapol: [30-40]%	Herbapol: [40-50]%	Herbapol: [40-50]%
Comp. 2	Dilmah: [5-10]%	Dilmah: [0-5]%	US Pharmacia: [10-20]%	US Pharmacia: [5-10]%	Biofluid: [10-20]%	Biofluid: [10-20]%
Comp. 3	Ahmad: [0-5]%	Ahmad: [0-5]%	Malwa: [5-10]%	Malwa: [5-10]%	Malwa: [5-10]%	Malwa: [5-10]%

Source: Annex 22

Table 3 – Production and supply of branded tea: distinction by type (2019)

2019	Black tea		Green tea		Fruit and herbal infusions	
	Value	*Volume*	*Value*	*Volume*	*Value*	*Volume*
Ekaterra	**[50-60]%**	**[50-60]%**	**[20-30]%**	**[10-20]%**	**[10-20]%**	**[5-10]%**
Comp. 1	Mokate: [10-20]%	Mokate: [20-30]%	Herbapol: [30-40]%	Herbapol: [30-40]%	Herbapol: [30-40]%	Herbapol: [30-40]%
Comp. 2	Dilmah: [5-10]%	Dilmah: [0-5]%	US Pharmacia: [10-20]%	US Pharmacia: [5-10]%	Biofluid: [10-20]%	Biofluid: [10-20]%
Comp. 3	Ahmad: [0-5]%	Ahmad: [0-5]%	Malwa: [5-10]%	Malwa: [5-10]%	Malwa: [5-10]%	Malwa: [5-10]%

Source: Annex 22

Table 4 – Production and supply of branded tea: distinction by type (2018)

2018	Black tea		Green tea		Fruit and herbal infusions	
	Value	*Volume*	*Value*	*Volume*	*Value*	*Volume*
Ekaterra	**[60-70]%**	**[50-60]%**	**[20-30]%**	**[10-20]%**	**[10-20]%**	**[10-20]%**
Comp. 1	Mokate: [10-20]%	Mokate: [10-20]%	Herbapol: [30-40]%	Herbapol: [30-40]%	Herbapol: [30-40]%	Herbapol: [30-40]%
Comp. 2	Dilmah: [5-10]%	Dilmah: [0-5]%	US Pharmacia: [5-10]%	US Pharmacia: [0-5]%	Biofluid: [10-20]%	Biofluid: [10-20]%
Comp. 3	Ahmad: [0-5]%	Ahmad: [0-5]%	Malwa: [5-10]%	Malwa: [5-10]%	Malwa: [5-10]%	Malwa: [5-10]%

Source: Annex 22

(50) These tables show that ekaterra is the market leader in branded black tea in Poland whilst it has a smaller market position in green or herbal branded tea (where Herbapol is the leader).

(51) The tables below provide ekaterra's and its main competitors' market shares for the production and supply of branded tea in Poland, with a distinction by format, for 2020, 2019 and 2018:

Table 5 - Production and supply of branded tea: distinction by format (2020)

2020	Tea bags		Loose-Leaf	
	Value	*Volume*	*Value*	*Volume*
Ekaterra	**[40-50]%**	**[40-50]%**	**[10-20]%**	**[20-30]%**
Comp. 1	Herbapol: [10-20]%	Herbapol: [10-20]%	Herbapol: [10-20]%	Herbapol: [10-20]%
Comp. 2	Mokate: [5-10]%	Mokate: [10-20]%	Mokate: [10-20]%	Mokate: [10-20]%
Comp. 3	Dilmah: [0-5]%	Dilmah: [0-5]%	Dilmah: [5-10]%	Dilmah: [0-5]%

Source: Annex 22

Table 6 - Production and supply of branded tea: distinction by format (2019)

2019	Tea bags		Loose-Leaf	
	Value	*Volume*	*Value*	*Volume*
Ekaterra	**[40-50]%**	**[40-50]%**	**[10-20]%**	**[10-20]%**
Comp. 1	Herbapol: [10-20]%	Herbapol: [10-20]%	Herbapol: [10-20]%	Herbapol: [10-20]%
Comp. 2	Mokate: [5-10]%	Mokate: [10-20]%	Mokate: [5-10]%	Mokate: [10-20]%
Comp. 3	Dilmah: [0-5]%	Dilmah: [0-5]%	Dilmah: [5-10]%	Dilmah: [0-5]%

Source: Annex 22

Table 7 - Production and supply of branded tea: distinction by format (2018)

2018	Tea bags		Loose-Leaf	
	Value	*Volume*	*Value*	*Volume*
Ekaterra	**[40-50]%**	**[40-50]%**	**[10-20]%**	**[20-30]%**
Comp. 1	Herbapol: [10-20]%	Herbapol: [10-20]%	Herbapol: [10-20]%	Herbapol: [10-20]%
Comp. 2	Mokate: [5-10]%	Mokate: [10-20]%	Mokate: [5-10]%	Mokate: [10-20]%
Comp. 3	Dilmah: [0-5]%	Dilmah: [0-5]%	Dilmah: [5-10]%	Dilmah: [0-5]%

Source: Annex 22

(52) These tables show that ekaterra is the market leader in branded tea bags in Poland whilst it has a significantly smaller position in loose tea. These market shares have remained stable in the last three years.

5.2.2. Input foreclosure

5.2.2.1. Ability

(53) The results of the market investigation indicate that CVC may have the ability to foreclose Zabka's competitors post-Transaction.

(54) First, ekaterra's market shares for the supply of branded black tea ([50-60]%) and branded tea bags ([40-50]%) in Poland suggest that ekaterra has a significant degree of market power on these segments.[42] This is consistent with the responses received from retailers who explained that '*ekaterra is strong in black tea*'.[43]

(55) Second, the results of the market investigation confirm that black tea is an important category for Polish modern trade retailers.[44] This is confirmed by the penetration rate of the tea category in Poland which is close to 100%, which means that almost all consumers purchase tea in Poland.[45] As for black tea, one retailer explained that: '*Polish consumers* […] *have a particular taste for tea and black tea in particular. Despite the growing market shares of herbal and fruit tea in Poland, black tea remains the main category. Tea is very popular in Poland and therefore it is an important product category*'.[46]

(56) Third, some of ekaterra's brands appear to be must-have brands.[47] All retailers interrogated indicated that ekaterra holds one or several must-stock brands in Poland.[48] Among the brands listed, Lipton is the most cited brand.[49]

42 Non-horizontal guidelines, para. 35.
43 Questionnaire to retailers, non-confidential response to question 10.
44 Non-horizontal guidelines, para. 34.
45 Non-confidential minutes of a conference call with a retailer held on 24 March 2022.
46 Non-confidential minutes of a conference call with a retailer held on 7 April 2022.
47 Non-Horizontal Guidelines, para. 34.
48 Questionnaire to retailers, non-confidential response to question 11.
49 Questionnaire to retailers, non-confidential response to question 11.1.

(57) In this respect, one retailer explained that '*Lipton (Yellow Label) is the preferred tea brand of Polish consumers*'.[50] Another retailer indicated that '*Lipton and Saga are the strongest and the most important brands for tea in Poland*'.[51] In the same vein, according to a third retailer: '*Lipton is a must-have brand* […] *as this is the leader in the category*'. [52] One other retailer cited Lipton as a must-have brand for black tea in the tea bag category.[53]

(58) Fourth, competing brands do not appear to constitute credible alternatives for retailers.[54] By way of illustration, one retailer explained that it sells brands from competitors of ekaterra but explained that '[these brands] *are not as important as Lipton and Saga, which are must-have brands. The absence of these brands in* [Confidential] *stores in Poland would in practice be difficult to accept by consumers and would most likely cause their irritation*'.[55] Accordingly, '*if ekaterra were to stop supplying Lipton products* […] *this would be harmful as* [this retailer] *would not have credible alternatives to which it may turn, especially for black tea*'.[56]

(59) In view of the above, the Commission considers that the merged entity may have the ability to foreclose Zabka's competitors post-Transaction in the plausible market for the supply of branded black tea to modern trade retailers and on the plausible market for the supply of tea bags to modern trade retailers.

(60) However, as explained in further detail below, the Commission considers that the merged entity will lack the incentive to foreclose these downstream competitors.

5.2.2.2. Incentives

(61) The Commission investigated the incentives that the merged entity may have to restrict the access of Zabka's competitors to ekaterra's brands by cutting their supplies or increasing the price charged to these downstream competitors. In this respect, the market investigation revealed that an input foreclosure strategy is unlikely to be profitable for the merged entity because the downstream profits that the merged entity would get are unlikely to compensate the upstream losses that it would likely have to incur.[57]

(62) First, the downstream gains for Zabka would be limited because only a limited number of customers would likely switch to Zabka's stores. In the first place, the market investigation revealed that customers of other convenience stores (e.g. Eurocash, Dino and Carrefour) are unlikely to switch to Zabka's stores if they no longer find ekaterra's brands in their convenience stores or if the retail price of ekaterra's products in these stores increases. This is because the category of convenience stores targets young customers and impulse purchases such as alcohol,

50 Non-confidential minutes of a conference call with a retailer held on 7 April 2022.
51 Non-confidential minutes of a conference call with a retailer held on 24 March 2022.
52 Non-confidential minutes of a conference call with a retailer held on 30 March 2022.
53 Questionnaire to retailers, non-confidential response to question 11.1.
54 Non-horizontal guidelines, para. 36.
55 Non-confidential minutes of a conference call with a retailer held on 24 March 2022.
56 Non-confidential minutes of a conference call with a retailer held on 24 March 2022.
57 Non-horizontal guidelines, para. 40.

cigarettes and snacks.[58] As a result, tea does not appear to be a significant driver of customer traffic for convenience stores.

(63) This is also confirmed by data related to tea consumption in convenience stores in Poland. Convenience stores only account for 10-25% of the retail sales of tea in Poland compared to 30-50% for discounters.[59] This is also consistent with the fact that Zabka represents only a small portion of ekaterra's sales in Poland ([0-5]%).[60]

(64) As a result, tea does not appear to be a key input for convenience stores, which means that an input foreclosure strategy with respect to branded tea products is unlikely to make customers of other convenience stores switch to Zabka's stores.

(65) In the second place, ekaterra's brands may constitute an important input for other types of stores (i.e. discounters, supermarkets, hypermarkets) and this may be the reason why these retailers have expressed some degree of concerns regarding access to ekaterra's products during the market investigation.[61] However, these other types of stores are not close competitors of Zabka. In this respect, the information provided by the Parties in the course of the investigation shows that convenience stores are in general smaller than other types of stores and have wider opening hours and narrower product ranges.[62]

(66) This is also confirmed by the results of the market investigation. One retailer explained for instance '[r]*egarding the assortment of tea products, as Zabka operates convenience stores only and such stores do not have a lot of shelf space, it does not have the same range of SKUs as its competitors*'.[63]

(67) This more limited competition between large retailers and convenience stores with regards to the sale of tea is also consistent with the data collected in the course of the investigation, which confirms that the price of branded tea products sold in convenience stores is usually higher than in discount stores, supermarkets and hypermarkets.[64] This is further confirmed by the data of Zabka's and its competitors' promotional activities which show that for a similar percentage discount of around [10-20]%, the sales of black branded tea in a discount store almost double whereas the sales in a convenience store increase by only [10-20]%.[65] This shows that customers purchasing tea in convenience stores are less price sensitive than customers purchasing tea in discount stores.

(68) Accordingly, if ekaterra were to foreclose discounters, supermarkets or hypermarkets, only a limited number of customers would likely switch to Zabka's stores, which limits the incentive of the merged entity to engage in such strategy. This is all the more so in view of Zabka's limited market share ([5-10]%) for the

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58 Non-confidential minutes of a conference call with a retailer held on 7 April 2022.

59 Questionnaire to retailers, non-confidential response to question 9.

60 Form CO, para. 193.

61 Non-confidential minutes of a conference call with a retailer held on 24 March 2022 and Questionnaire to retailers, non-confidential response to question 23.1.

62 Form CO, Annex 29.

63 Non-confidential minutes of a conference call with a retailer held on 7 April 2022.

64 Form CO, Annex 34.

65 Non-confidential minutes of a conference call with a retailer held on 7 April 2022 and response to the Commission's request for information dated 1 April 2022, question 4.

overall retail distribution of consumer goods, including different types of stores (i.e. convenience stores, supermarkets, hypermarkets and discounters).[66]

(69) Second, ekaterra would risk incurring significant upstream losses since ekaterra would not be able to isolate and discriminate convenience stores, which are Zabka's closest competitors.[67]

(70) In the first place, ekaterra's ability to discriminate convenience stores is limited for customers that operate various types of stores (i.e. convenience stores and other types of stores) such as Carrefour or Auchan. In this respect, the market investigation confirmed that retailers operating different types of stores tend to purchase tea products all together for all their stores.[68] According to the Parties' data, these customers represent approximately [10-20]% of ekaterra's sales in Poland.[69]

(71) In the second place, for convenience stores supplied by third-party distributors, ekaterra has no control on prices and quantities of products sold by intermediary distributors in Poland which account for [20-30]% of its sales (i.e. approximately the same amount as discounter Biedronka which is the first customer of ekaterra in Poland).[70]

(72) Accordingly, if the merged entity intends to discriminate Zabka's closest competitors (e.g. by cutting their supplies of ekaterra's brands or increasing the price of these products), ekaterra would have to forgo (or risk losing) [30-40]% of its turnover ([10-20]% of turnover corresponding to retailers operating different types of stores and [20-30]% to distributors). For the reasons explained above, such losses are unlikely to be recouped downstream as the number of customers switching to Zabka's stores is likely to be limited.

(73) This is consistent with the responses received in the course of the investigation since all of ekaterra's competitors who participated to the investigation explained that it would not be financially profitable for ekaterra to restrict the supplies of Zabka's competitors.[71] By the same token, one retailer indicated that '*if ekaterra were to give preferential treatment to Zabka, Lipton sales would significantly drop, which would be risky for the merged entity and thus unlikely*'.[72]

(74) In view of the above, it can be concluded that the merged entity will likely lack the incentive to foreclose Zabka's competitors by restricting or cutting their supplies of ekaterra's brands or by giving Zabka access to competitively sensitive information on their activities.

5.2.2.3. Impact

(75) As for the impact of a potential input foreclosure strategy, it can be noted that the only retailers who expressed concerns in connection with the Transaction are

66 Form CO, Tables 4-7.
67 Non-Horizontal Guidelines, para. 43 (fn 4).
68 Non-confidential minutes of a conference call with a retailer held on 30 March 2022.
69 Form CO, para. 193.
70 Form CO, para. 124.
71 Questionnaire to ekaterra's competitors, non-confidential response to question 19.
72 Non-confidential minutes of a conference call with a retailer held on 27 April 2022.

discounters.[73] In contrast, Zabka's closest competitors, i.e. competing convenience stores, did not express input concerns in this respect.[74] Assuming that the merged entity would have the ability and incentive to engage in input foreclosure, the market investigation thus suggests that such strategy would not have a material impact on the market.

(76) In any event, there is no need to consider the overall impact of such a strategy as the merged entity will lack the incentive to foreclose Zabka's competitors for the reasons set out above.

(77) Consequently, the Commission concludes that the Transaction does not give rise to serious doubts in relation to input foreclosure concerns, in particular with respect to the supply of black tea and tea bags to competing convenience stores.

5.2.3. Customer foreclosure

5.2.3.1. Ability

(78) With respect to customer foreclosure, the limited market shares of Zabka on the procurement market (approx. [5-10]%)[75] and on the overall market for the retail distribution of daily consumer goods ([5-10]%) suggest that Zabka is not a critical customer. The existence of a number of competitors downstream, including on the segment for convenience stores (e.g. Eurocash, Livio, Chorten, rabat Detal, Chata Polska) further suggests that the access of ekaterra's competitors to retailers in Poland will remain largely unaffected by the Transaction. As a result, the merged entity will not be able to foreclose ekaterra's competitors post-Transaction. This is consistent with the fact that no participant to the investigation expressed customer foreclosure concerns. In view of the above and based on the results of the market investigation, the Commission concludes that the merged entity will not be able to engage in customer foreclosure.

5.2.3.2. Incentive

(79) The incentive of the merged entity to engage in customer foreclosure will also be limited given Zabka's limited market share downstream and the limited impact that such strategy would have on ekaterra's competitors which would keep sufficient economic alternatives downstream.[76]

(80) Accordingly, the Commission finds that the merged entity will likely lack the ability and incentive to engage in customer foreclosure so there is no need to consider the impact of any such strategy on the market.

5.2.4. Conclusion on vertical non-coordinated effects

(81) In light of the considerations above and based on the results of the investigation, the Commission concludes that the Transaction does not give rise to serious doubts

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73 Non-confidential minutes of a conference call with a retailer held on 24 March 2022 and questionnaire to retailers, non-confidential response to question 23.1.

74 Non-confidential minutes of a conference call with a retailer held on 27 April 2022 and questionnaire to retailers, non-confidential response to question 23.1.

75 Form CO, para. 141 (fn 71).

76 See section 5.2.3.1. above.

as to its compatibility with the internal market and the EEA agreement with respect to vertical non-coordinated effects between:

(a) the upstream markets for the production and supply of tea, and in particular branded black tea and tea bags to modern trade retailers in Poland;

(b) the downstream market for the retail distribution of daily consumer goods, and in particular in small format retail stores in Poland.

6. CONCLUSION

(82) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President