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Working Party No. 3 on Co-operation and Enforcement

ANTITRUST ISSUES INVOLVING MINORITY SHAREHOLDING AND INTERLOCKING DIRECTORATES

-- Turkey --

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ROUNDTABLE ON ANTITRUST ISSUES INVOLVING MINORITY SHAREHOLDING AND INTERLOCKING DIRECTORATES

1. Introduction

1. Holding of minority shares between competitors and interlocking directorates may jeopardize competition. Minority shareholdings are considered under rules on mergers and acquisitions if they lead to change in the control of the undertaking in question. In this regard, they play an important role in substantive assessments under rules on mergers and acquisitions. However, minority shareholding may also play an important role in substantive assessments under rules on mergers and acquisitions even if they do not involve transfer of control. In the absence of change in control, minority shareholdings may still be subject to examination, but this time under rules on restrictive agreements if anti-competitive effects are realized in the market. Similarly, interlocking directorates are also considered under rules on restrictive agreements if they create anti-competitive effects in the market.

2. Minority shareholding under rules on mergers and acquisitions

2.1 Minority shareholding and the transfer of control

2. According to the rules on mergers and acquisitions[1], in order to consider a transaction as a merger or an acquisition, control is the decisive element in the sense that only transactions involving transfer of control require notification provided that certain thresholds are exceeded. Therefore, minority shareholding can only be regarded as an acquisition and triggers notification when it enables the holder to control the undertaking. For the purposes of the Communiqué No 1997/1, control can be constituted by rights, contracts or any other means which, either separately or in combination, de facto or by law, grant the opportunity of **exercising decisive influence on an undertaking**, and in particular by an ownership right or an operative right to use all or part of the assets of an undertaking, or by rights or contracts which ensure decisive influence on the composition or decisions of the bodies of an undertaking. Control shall be deemed to have been acquired by the holders of rights, or persons or undertakings entitled to use the rights under a contract, or in spite of not having such right and power, have de facto power to exercise such rights.

1 Rules on mergers and acquisitions in Turkey are provided in the Act No 4054 on the Protection of Competition (Competition Act) and Communiqué on the Mergers and Acquisitions Calling for the Authorization of the Competition Board (Communiqué No 1997/1). The basic aim of the rules on mergers and acquisitions is to avoid creation or strengthening of dominance that decreases competition significantly in any market for goods or services in Turkey. Therefore, dominance test delineates the basic framework for merger review. According to Communiqué 1997/1, it is compulsory to take the authorization from the Competition Board in case the combined market share of the parties exceeds 25% in the relevant product market or, even though it does not exceed this rate, their total turnover exceeds YTL twenty-five million. Privatization transactions are subject to Communiqué numbered 1998/4 on the Procedures and Principles to be pursued in Pre-Notifications and Authorization Applications to be Filed with the Competition Authority in order for Acquisitions via Privatization to Become Legally Valid (Communiqué No 1998/4). However, provisions of Communiqué No 1997/1 are also applicable to acquisitions via privatization transactions provided that they are not contrary to Communiqué No 1998/4.

3. In line with the above mentioned definition of the term "control" in the Communiqué No 1997/1, minority shareholding would lead to (joint) control of the undertaking if it enables the holder to exercise decisive influence on the undertaking in question. For instance, if the holder of the minority shareholding can veto the "strategic commercial decisions" of the undertaking such as the ones regarding the appointment of the senior management, approval of the business plans, investments and the budget, then it is considered that minority shareholding leads to (joint) control and there is an acquisition within the meaning of the Communiqué No 1997/1. Such acquisitions therefore require filing and are assessed according to the criteria found in the Communiqué No 1997/1.[2]

4. However, if the minority shareholding does not lead to (joint) control, the transaction may still be considered under Articles 4 and 5 of the Competition Act prohibiting anti-competitive agreements, concerted practices and decisions, and providing exemption conditions for such anti-competitive conduct respectively. This may be the case, for instance, if the transaction is committed in an oligopolistic market where an undertaking may acquire minority shares in its rival.[3] Coordinated effects of the relevant transaction are considered via such an analysis.

2.2 Minority shareholding and substantive analysis under rules on mergers and acquisitions

5. Minority shareholding may also be important in the substantive analysis under rules on mergers and acquisitions that aim to avoid creation or strengthening of dominance that decreases competition significantly in any market for goods or services in Turkey. For instance, in one case[4] regarding privatization of İzmir port in Western Turkey through transferring its operating rights for 49 years, minority shares in the acquiring party played a crucial role in the analysis of the Competition Board who eventually blocked the acquisition. The acquirer in this case was a joint venture group comprising of three undertakings, namely Babcock and Brown Turkish Ports Ltd. (Bobcock), PSA Europe Pte. Ltd. (PSA) and Akfen Altyapı Yatırımları Holding A.Ş. (Akfen). Bobcock had single control of the joint venture group whereas PSA and Afken only held minority shares. However, PSA and Akfen previously acquired the operating rights of another port, namely Mersin port in southern Turkey through a privatization transaction.

6. The Competition Board decided that although PSA and Akfen did not acquire the operating rights of İzmir port, it should be analyzed whether their minority shares in the acquiring joint venture group could restrain competition. First of all, both ports (Mersin and İzmir) were dominant in their respective hinterlands. The markets where port services were offered were characterized with limited competition due

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2 See Article 6 of the Communiqué No 1997/1 which provides that "… the structure of the relevant market, and the need to maintain and develop effective competition within the country in respect of actual and potential competition of undertakings based in or outside the country, … the market position of the undertakings concerned, their economic and financial powers, their alternatives for finding suppliers and users, their opportunities for being able to access sources of supply or for entering into markets; any legal or other barriers to market entry; supply and demand trends for the relevant goods and services, interests of intermediaries and end consumers, developments in the technical and economic process, which are not in the form a barrier to competition and ensure advantages to a consumer, and the other factors …" are to be taken into account in assessing mergers and acquisitions. It is obvious that the criteria are not exhaustive and are complemented by evaluations in the case law of the Competition Board.

3 In one case, the Competition Board considered *ex officio* a transaction where an undertaking acquired 25% of the shares of its main rival in an oligopolistic market. As the transaction involved no change in control, it was considered that the transaction could be examined under Articles 4 and 5 of the Competition Act. However, because the acquiring party decided to sell its shares to other shareholders of the company with a second transaction, the assessment was terminated without further examination. See *Orica* (29.3.2007; 07-29/268-98).

4 *Privatization of İzmir Port* (20.6.2007; 07-53/615-204)

to the nature of such services on one hand or high costs of building infrastructure similar to ports on the other. As economic policy considerations preferred the transfer of operating rights to private monopolies due to reasons based on either the nature of the market or the nature of the business, it was taken into account that any possibility of remaining competition in the market necessitated careful protection by the Competition Board. PSA and Akfen were in a dominant position in Mersin port in southern Turkey as a result of their control in this port. In this context, minority shares of PSA and Akfen, who were holding dominant position as a result of their control in Mersin port in southern Turkey, in their principal competitor (the joint venture group controlled by Bobcock) would have negative impact on the remaining competition. Although PSA and Akfen could not have direct control in İzmir port as Bobcock would have its sole control, it was considered that they would arrange their own conduct in a way refraining from competition. Such an attitude would be facilitated more as a result of information capabilities that could be obtained via membership in the board of directors resulting from minority shares, or other ways. This could make it easier for the two operators (PSA and Akfen on one hand and Bobcock on the other) to avoid competition in regions of the country within the common hinterlands of the two ports (Mersin and İzmir). Moreover, they could also refrain from competitive conduct that could be performed to have a share from international traffic. A dominant undertaking's involvement in acquisitions in a way to remove possibilities of competition would ensure continuation of its dominance as well as strengthening of it. The competitive relationship that could be removed through the transaction was the final piece of the remaining competition in the region overlapped with the hinterlands of both ports especially in the field of container handling due to lack of any other infrastructure with serious competitive potential. As a result, the Competition Board decided that building common interests by operators of Mersin port (PSA and Akfen) via minority shares in the joint venture group which would acquire İzmir port would strengthen their dominant position and decrease competition significantly. Thus, the Competition Board blocked acquisition of operating rights of İzmir port by joint venture group comprising of Bobcock, PSA and Akfen.[5]

3. Minority shareholding and interlocking directorates under rules on anti-competitive agreements and remedies

7. In one case[6], three undertakings (Es Nevtur (EN), Lüks Göreme (LG) and Nevsehir Kapadokya Turizm (NKT)) operating in intercity passenger transport sector agreed to combine certain amount of their assets under another undertaking called Nevşehirliler Turizm (NT) in return for certain amount of shares of this undertaking and not to create another undertaking to compete with NT. At that time NT was acting as an agent of Metro, another undertaking operating in the sector, and selling its tickets. Firstly, the Competition Board examined whether the transaction involved any change in control and therefore should be dealt under the rules on mergers and acquisitions. After extensive analyses, the Competition Board concluded that the transaction did not include change of control and therefore could not be dealt under rules on mergers and acquisitions. Rather, the Competition Board decided that the transaction was an agreement within the scope of Article 4 on restrictive agreements of the Competition Act.

8. In its assessments regarding coordination of competition between parties to the transaction and Metro, the Competition Board considered that NT was selling Metro's tickets before the transaction. Following the transaction NT not only continued to sell Metro's tickets as its agent, but also became Metro's competitor in intercity passenger transport market. It was taken into account that in a competitive market it was not possible for an undertaking to sell its competitor's tickets and this could only be possible if there was an institutionalized cooperation between them instead of competition. There was such an

5 It is also worthwhile to mention that in the draft contract which sets forth the conditions to participate in the bidding process of İzmir port prepared by the Privatization Authority, it is clearly mentioned that the acquirer of the operating rights of Mersin port should not bid for İzmir port either individually or within a group.

6 *Nevşehirliler Turizm* (28.9.2006; 06-67/909-263)

institutionalized cooperation between NT and Metro and the most important link that enabled such cooperation was the fact that the director, who was holding minority shares in NT, also owned most of the buses operated by Metro. Actually, it was admitted by the director that prices were determined via talks with Metro. As a remedy, the Competition Board, in order to establish competition, asked NT to end its agency relationship with Metro, and in addition required the director either to sell its minority shares in NT or annul the contracts of his buses operated by Metro. Moreover, other operators party to the transaction, namely EN, LG and NKT, were also asked either to sell their shares in NT or conclude a partnership agreement compatible with the Competition Act and notify it to the Competition Board.

9. In another case[7] involving a cartel among aerated concrete producers, the fact that one of the parties to the cartel had minority shares in a competitor and two members of its board of directors also had the same position in this competitor was regarded as a facilitating factor in infringing the Competition Act. For instance, these common members of the board of directors represented both of the undertakings in the meetings held among the cartel participants. The undertaking whose minority shares were held by its competitor realized concrete steps to end membership of the common members in its board of directors during the investigation stage and this was taken into account as a mitigating factor by the Competition Board.

10. Last but not least, in an investigation[8] which was carried out in the "market for scheduled maritime transportation by ro-ro vessels carrying wheeled and mobile cargo", the issue of interlocking directorates was discussed extensively. Two rival ro-ro shipping groups named ULUSOY Ro-Ro Group (ULUSOY Group) and UN Ro-Ro Group (UN Group) concluded a protocol not to change their tariffs and terms of payments without consent of the other party. The protocol that explicitly targeted coordination of prices was an anti-competitive agreement under Article 4 of the Competition Act.

11. There were 5 and 6 associated undertakings in UN Group and ULUSOY Group respectively. Mr. Saffet ULUSOY and Mr. Erol SOYLU respectively owned 20% and 5% of the shares of each of the associated undertakings within ULUSOY Group. In addition to that, ULUSOY Group owned 26,4% of the shares in the UN Group. Mr. ULUSOY was at the same time a member of the board of directors of all associated undertakings within ULUSOY Group while he was also the chairman of the boards of directors of the associated undertakings within the UN Group based on ULUSOY Group's holding of 26,4% of the shares in UN Group. Finally, Mr. SOYLU was a member of boards of directors of all associated undertakings within the ULUSOY Group and he was also a board member in all of the associated undertakings within the UN Group.

12. According to the Competition Board, it was inevitable that common members in the boards of directors of the rival ro-ro shipping groups would have cooperative effects restricting competition. The fact that such an intertwined structure occurred in a sector where concentration level was very high facilitated and strengthened the cooperation and coordination. The Competition Board stated that it was not likely for these two ro-ro shipping groups to determine the prices they charged without any coordination among them although they paid attention not to increase the recent prices at identical amounts and on the same dates. As a result, the Competition Board decided that members of the boards of directors in those associated companies belonging to any group should not assume membership in the boards of directors of the companies within the other and thus common membership should be terminated.

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7 *Aerated Cartel* (30.5.2006; 06-37/477-129).

8 *Ulusoy & UN Ro-Ro* (13.7.2005 05-46/668-170).

4. Conclusion

13. Rules on mergers and acquisitions in Turkey are applicable to minority shareholdings enabling a change in the control of the undertaking in question, whereas rules on anti-competitive agreements may be applicable for cases involving minority shareholdings falling short of ensuring a change in control but producing anti-competitive effects. Moreover, whenever common membership in the board of directors of rival undertakings (interlocking directorates) causes anti-competitive effects, this might also be subject to examination under rules on anti-competitive agreements. As remedies in cases of anti-competitive agreements, it is seen from the case law that the Competition Board prefers sale of minority shares and termination of common membership in the boards of directors. Finally, in case minority shareholdings might enable a dominant undertaking to strengthen its dominance and decrease competition significantly in the context of mergers and acquisitions, this might be a ground to block the transaction.