



PARIS

**DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**  
**COMMITTEE ON COMPETITION LAW AND POLICY**

**English text only**

**DAFFE/CLP/WD(2000)48**  
**For Official Use**

**ROUNDTABLE ON JOINT VENTURES**

**-- Note by Turkey --**

*This note is submitted by the Turkish Delegation to the Committee on Competition Law and Policy FOR DISCUSSION at its forthcoming meeting on 24-25 October 2000.*

**96054**

**Document complet disponible sur OLIS dans son format d'origine**  
**Complete document available on OLIS in its original format**

**English text only**

## **I. Introduction**

1. Joint ventures cover a wide range of co-operative agreements between companies. A joint venture is often associated with formation of new company. The key characteristic of a joint venture is joint control of business venture by two or more independent firms. The definition and treatment of joint ventures from Turkish Competition Policy perspective are stated below.

## **II. Definition**

2. After stating in paragraph 1 of Article 7 of the Act on Protection of Competition, No:4054: "Merger of two or more undertakings, or acquisition, except acquisition by inheritance, by an undertaking or by a person, of another undertaking, either by acquisition of all or a part of its assets or securities or other means by which that person or that undertaking acquires a controlling power in that undertaking concerned, which would create or strengthen the dominant position of one or more undertakings as a result of which, competition would be significantly impeded in a market for goods and services in the whole territory of State or in a substantial part of it, is unlawful and prohibited.", in paragraph 2 of the same Article, it is stated that "the Board shall publish the categories of mergers and acquisitions which, to be considered as legally valid, require a prior notification to the Board."

3. Based on this said Article 7/2, joint ventures are defined in part (c) of Article 2 entitled "Cases Considered as Merger and Acquisition" of the Communiqué No: 1997/1, entitled "Communiqué on Mergers and Acquisitions Calling for the Authorisation of the Competition Board" as: "Joint ventures which emerge as an autonomous economic entity possessing assets and labour to achieve their objectives, and which do not have any aims or effects restricting competition among the parties, or between the parties and the joint venture". Accordingly, being an autonomous economic entity in order to achieve the aim (functional independency), not having any aims or effects restricting competition and though not mentioned in the Communiqué, those procedures having conditions of joint control, which are the basic elements of joint ventures, are assessed to create concentration. In case any of these elements is not present, subject joint venture is considered as an agreement leading to co-operation and thus evaluated under Article 4 of the Act No:4054.

4. In the EU, Council Regulation dated 21.12.1989 and Numbered 4064/89 regulates the rules to be implemented on mergers, acquisitions and joint ventures. In Turkey, legislations regarding mergers, acquisitions and joint ventures have been regulated parallel with the said Regulation. However, some amendments were made on the Council Regulation 4064/89 through Council Regulation No: 1310/97, dated 30.06.1997 which was put into effect on March 1, 1998. Owing to the modification on joint ventures, a joint venture who functions completely as an autonomous entity and who is under joint control of the parties shall be assessed as a merger creating concentration as viewed by EU Competition Law, and be assessed under Regulation No: 4064/89. The element of not creating co-ordination of competition is not anymore assessed in EU Competition Law as establishing element in the evaluation of joint ventures creating concentration. In Turkey however, studies on the new communiqué taking into account the latest changes in EU is in progress.

5. In Article 4 of the Communiqué No: 1997/1, amended by Communiqué No: 1998/2, there is the following provision: "... if, regarding the relevant product market in all parts or a part of the country, the total market shares of the merging or acquiring undertakings exceed 25 percent of the market, or their total turnover exceeds 25 trillion Turkish Liras, even though the total market shares do not exceed this rate, it is compulsory for them to receive the authorisation of the Competition Board". Thus, joint ventures that are over the stated thresholds are subject to authorisation under the Communiqué.

**Sectoral Breakdown of Joint Venture Decisions  
5.11.1997 – 31.12.1999**

SECTORS	JOINT VENTURE
Chemistry and chemical products, petroleum products, fertilisers	2
Construction, cement and other construction materials	1
Press, publication, records, cassettes etc. recorded media	2
Food products and refreshments	2
Electricity, gas, water	2
Vehicles for land, air, water and railways	1
Furniture, White Goods, Toys, Sports Equipment, Musical Instruments, Jewellery	1
Financial Services (banking, insurance etc.)	2
Textile and ready-wear	1
<b>TOTAL</b>	<b>14</b>

6. In Turkey, most of the notified joint ventures are built by local and foreign partnerships. As a consequence of globalisation, while foreign firms want to enter the Turkish market with local firms having experience and market information, on the other hand, local firms would like to make use of the know-how of the former. In addition to this, foreign firms, via joint ventures, learn how business is done in Turkish markets, make use of the distribution channels and marketing knowledge of local firms, and are able to carry out transactions of country's legislations via local firms. And the local firms, on the other side, reach new technologies and marketing information, become able to transfer technology at lower costs, and take advantages of the "trade mark" or "brand name" of the foreign partner.

### III. Why do firms engage in joint ventures, and how do competition agencies deal with them?

7. The Competition Board, regarding joint ventures, accepts presence of all parties at the same market with the joint venture as a co-operation agreement having the effect of restriction on competition, and thus does not authorise such transactions. That is to say, regarding the application made for 5 different joint ventures to be formed by Migros Türk T.A.S. and Metro AG, the decision of the Turkish Competition Board dated 19.03.1998 and numbered 57/424-52, significantly clears the issue of coexistence of parties and the joint venture in the same market. In the said decision, after stating: "... presence of both mother companies (Metro AG – Migros Türk T.A.S.) in the same geographical market (city and town centers) with three different joint ventures formed with Sok Ucuzluk Marketleri A.S., Real Market A.S. and Metro Grossmarket Bakırköy Alisveris Hizmetleri Ltd. Sti. **shall transform this joint venture to an agreement restricting competition, and creating co-operation**", and for this reason, it was decided that, regarding the subject joint venture transactions:

"As per paragraph 3 of Article 6 of the Communiqué No: 1997/1, as long as the subject joint venture agreement is in force, both mother companies not to coexist in the same geographical market and directly or indirectly enter into the relevant product market with the joint venture; in other words, only one of Metro AG or Migros Türk T.A.S. be permitted to operate with the joint venture in the relevant product market in any city or town center within the territory of Turkey; and in case not acting in compliance with this condition, subject joint venture be considered to fall under Article 4 of the Act No:4054 and be considered as an agreement restricting competition

and notification be made, stating preliminary research and/or investigation with Authority's own initiative be initiated".

8. As understood by this decision, the Competition Board has accepted to consider coexistence of all parties in the same market with the joint venture as a co-operation agreement restricting competition.

9. Below given are sample decisions regarding joint ventures:

### **LPG Joint Venture.**

10. Upon the application for granting authorisation to the referred "joint venture", along the lines of the shareholders contract concluded between the parties, in order for the joint venture company to gain validity which is targeted to be established for supplying liquefied petroleum gas (LPG), the Competition Board, in its meeting of 27.05.1999, did not give authorisation to the transaction in question as a result of negotiating the report prepared by the Reporters, and the evaluations performed. Below-mentioned are the relevant parts of the said decision:

"Upon the notification registered in the records of the Authority on 02.11.1998 with the request for granting authorisation to the application regarding the referred joint venture, along the lines of the shareholders contract concluded between the parties, in order for the joint venture company to gain validity which is targeted to be established with the participation of 39 firms for purposes of supplying liquefied petroleum gas (LPG), it was expressed in the Preliminary Examination Report prepared by the Reporters and submitted to the Chairmanship of Competition Board that it could not be understood from the information and documents available in the file whether the joint venture which is the subject of file was a merger creating concentration under the article 7 of The Act, or an agreement creating co-operation that may be considered under the article 4 of The Act.

The Preliminary Examination Report in question was discussed in the meeting of the Board and it was decided that the application in question be subjected to final examination.

Besides the fact that the quorum as to taking decisions for the management of the joint venture which is the subject of file was not organised such that 29 LPG distribution companies having minority shares would have a word in strategic decisions, any provisions could not be noticed in the shareholders contract which ensure a right to veto for these companies. Within this framework, it is not possible to speak about a joint control, in other words to say that there formed a new will independent of the will of the individual parties concerned in the joint venture in question. Furthermore, it is observed that the financial and administrative structuralization of the joint venture to be established and its position in the structure of the market are not independent of the parties, and that therefore, it does not bear the following condition sought in the sub-paragraph (c) of the article 2 of the Communiqué No. 1997/1, which lists the cases of mergers and acquisitions: "An independent economic entity such that it would possess the manpower and assets so as to realise its goals..."

11. The contract which is the subject of application should be considered as a co-operation agreement which the undertakings party to the joint venture made among themselves. Essentially, due to gathering the competing undertakings, this agreement is not only contrary to the essence of the article 4 of The Act, but also involves some particular cases which are expressly stated in the sub-paragraphs of this article, and restrict competition. As the price and other conditions of sale are determined between the parties via the agreement in question, the opinion reached was that the following violations of competition

expressed would become practical: the subparagraph (a) of the second paragraph of the article 4 which reads as: “Determining the purchase or sale price of goods or services, elements constituting the price such as costs, profits, and any kind of terms of purchase or sale”; when it is taken into account that the large groups which are party to the company and may enter the supply market individually would easily control the supply and distribution of LPG in the market through the joint venture which already has a customer portfolio of about 92 percent in the distribution market, the sub-paragraph (b) of the same paragraph which reads as: “Partitioning the markets for goods or services, and sharing or controlling any kind of market resources or elements.”; and the sub-paragraph (c) which reads as: “Control of the amount of supply or demand as to goods or services, or determining them outside the market.”

12. In the light of the foregoing information;

It was decided that:

- the transaction which is the subject of file did not emerge as an independent economic entity and had effects restricting competition, and therefore was not a joint venture under the following sub-paragraph (c) of the article 2 entitled “Cases Deemed as Mergers or Acquisitions” in the “Communiqué Concerning the Mergers and Acquisitions Calling for the Authorisation of the Competition Board”: “Those joint ventures which emerge as an independent economic entity such that they would possess the manpower and assets so as to realise their goals, and which have no goal or effect of restricting competition between the parties, or the parties and the joint venture.”
- Therefore, the transaction which is the subject of application was not a merger or an acquisition under the Article 7 of The Act, but rather a co-operation agreement restricting competition under its article 4;
- as a result of the negative clearance and exemption examination performed along the lines of the request which takes place in the notification form and reads as “...In case the Competition Board does not give authorisation to the transaction which is the subject of notification, we submit that the notification be considered as an application for negative clearance or a notification for individual exemption.”, the agreement in question could not be granted a negative clearance due to having effects restricting competition under the article 4 of The Act;
- the agreement in question had a nature likely to ensure economic development as joint investments bring certain physical and economic advantages to the parties; however, due to the fact that such economic benefit does not reflect on the consumer, and the agreement restricts competition in a significant part of the relevant market and in an unduly manner, it did not bear the conditions for exemption which take place in the sub-paragraphs (b), (c) and (d) of the first paragraph of the article 5 entitled “Exemptions” in The Act, and therefore could not be granted an individual exemption;
- the application be not given authorisation, which related to establishing a joint venture company with the title “LPG Provision Distribution Industry and Trade Inc” to operate in the LPG supply market under the shareholders contract to be concluded between the parties with the participation of 39 companies operating in the Turkish LPG distribution market.”

*Garanti – Balfour*

13. In the Board meeting numbered 00-29/307, as a result of negotiations and assessments made the report prepared by the reporters upon the application to transfer 49.177096 percent of the shares of Garanti – Koza İnsaat Sanayi ve Ticaret A.S., who is under Koç Group, to Balfour Beatty Overseas Ltd. conditional authorization was granted to the transaction. Related parts of the subject decision are given below.

14. According to the Shareholder's Contract signed between Garanti – Koza İnsaat Sanayi ve Ticaret A.S. and Balfour Beatty Overseas Ltd., the company is said to operate in "construction and undertaking business" market. The territory of the Republic of Turkey has been determined as the geographical market.

15. In the "Introduction" section of the Shareholder's Agreement between Koç Holding A.S. and Balfour Beatty Overseas Ltd. (BBOL), it is concluded that pursuant to the transfer of the shares which are subject of notification, each of Koç Grubu and BBOL shall hold 49.177096 percent of shares, and the remaining 1.645808 percent of the shares shall be held by various persons. Further, it is stated that the company that shall be established will be "co-managed" by Koç Grubu and BBOL.

16. Within the frame of this information, it is understood that, as the result of acquisition, a joint venture company is established. Thus, now, it is necessary to determine, whether the co-managed company is or is not a joint venture company, and in order to assess this joint venture company under Article 7 of the Act No: 4054, it is necessary to determine whether it does or does not lead the way to concentration.

17. Regarding the joint ventures, the following definition is given in Article 2 of the Communiqué on the Mergers and Acquisitions Calling for the Authorisation of the Competition Board, Communiqué No: 1997/1, entitled "Cases Considered as Merger or Acquisition": **"Joint ventures which emerge as an autonomous economic entity possessing assets and labour to achieve their objectives, and which do not have any aims or effects restricting the competition among the parties, or between the parties and the joint venture"**.

18. Taking the above definition as first step, conditions to accept that a joint venture has concentrative effects and thus be subject to authorisation of the Competition Board and fall under the scope of Communiqué No: 1997/1 are the presence of undertaking (joint venture) which is under co-management, and this undertaking's emerging as an independent economic entity and not having any aims or effects restricting the competition among the parties, or between the parties and the joint venture.

19. As per the Shareholder's Agreement, both of Koç Grubu and Balfour Beatty Overseas Ltd. shall have control on 49.177096 percent of Garanti Koza. In addition, it is understood from other provisions of the agreement regarding the control of the joint venture that a full joint control has been established between the undertakings.

20. Garanti Koza-İnşaat Sanayi ve Ticaret A.S. before the joint venture act, operates and acts as an independent purchaser and seller. Thus, it is understood that it does have a level of operation and resources, which are sufficient for a fully-functioning joint venture. The geographical market where the company shall operate has been determined to be 16 "Countries of Agreement" among which Turkey takes her place as well. The duration of the company is established to be "unlimited as of the date of establishment". Thus, it is made clear here that the condition for the joint venture to be an autonomous economic entity is met.

21. As said in the Shareholder's Agreement: "Each of the parties agree that starting from the date the agreement is put into effect, and during the whole course of its validity, a party itself or the companies

connected with it shall perform no activities in the countries of agreement regarding the activities of the Company without the prior written consent of the other party", and thus parties' activities in the relevant product market has been bound to **"the receipt of written consent of the other party"**.

22. As known, parties' operation in the same product market with the joint venture changes the feature of joint venture as 'leading to concentration' to 'establishing co-ordination'.

23. Regulations in Article 7 of the aforesaid Shareholder's Agreement clarify that parties are in agreement with regard not to operate in the same market with the joint venture, and that the tendency of the parties is to operate in the relevant market via the joint venture. However, the statement found in Article 7.1 of the said Agreement as: "... without the prior written consent of the other party..." might create the possibility for both of the parties to operate in the relevant market, thus might lead to co-ordination.

24. On the other hand, when taking into consideration the competitive structure of the sector, it is contemplated that operation of only one of the parties with the joint venture in the same market shall not lead to a risk of co-ordination, and thus shall not result with a significant restriction on competition in the market.

25. Under the supervision of the above given information, for the subject joint venture transactions, in order not to create a co-ordination risk, maximum one of the parties should be able to operate in the relevant product market within the territory of the Republic of Turkey during the course of the joint venture period. Though the 25 percent market share threshold is not exceeded, it is understood that the joint venture is subject to authorisation under the "Communiqué on the Mergers and Acquisitions Calling for the Authorisation of the Competition Board, No: 1997/1", due to the reason that the turnover threshold stated in Communiqué No: 1997/1, amended by the Communiqué No: 1998/2 has been exceeded.

26. Though there is no healthy statistical information available regarding the construction sector in Turkey, it is viewed through the information and documents in the file that annual turnover of the construction sector is approximately 13 billion USD. As many numbers of undertakings operate in the sector, it can be spoken that the sector has a competitive structure and the level of concentration is low.

27. Representatives of sector state that there are 200 000 - 300 000 undertakings operating in the construction sector, 55 000 out of which holding contractor licenses; and the market share of the largest undertaking in the sector is only below ten percent.

28. In conclusion, it was decided that the subject transaction is not of a kind to create a dominant position or empower a dominant position in the relevant product market, and is not of a kind to result with a significant diminishing in competition neither in the whole or a part of the country; and with the condition that maximum one of the parties to the joint venture called as Garanti Balfour Beatty İnfaat Sanayi ve Ticaret A.S. is able to operate during the course of the operation of the joint venture, within the territory of the Republic of Turkey, in the relevant product market (where Garanti Balfour Beatty operates) be permitted; and in case carrying out transactions not complying with this condition, the joint venture be counted as an agreement restricting competition under Article 4 of the Act No: 4054, Regarding the Protection of Competition and thus preliminary research and/or investigation be necessary.