

The Turkish Competition Board authorizes the acquisition of a Turkish water supplier by a multinational company (Sirma / Danone)

Turkey, Mergers, Intellectual property, Relevant market, Geographic market, Dominance (notion), Thresholds, Change of control, Ancillary restriction, Agriculture/Food products

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The Turkish Competition Board ("Board") authorized the acquisition of 51% of the shares of Sirmagrup İçecek Sanayi ve Ticaret A.Ş. ("Sirma") by Danone SA ("Danone"), since this transaction does not create a dominant position or strengthen an existing dominant position in the relevant market.

Parties to the Operation

Acquirer. Danone is a multinational company established as per the laws of France and active worldwide in the production of fresh milk, packed water and special products for babies and sick persons, or old people having certain sensibilities.

Danone is active in the Turkish market through the companies Danone Hayat İçecek ve Gıda Sanayi ve Ticaret A.Ş. ("Danone Hayat"), Danone Tikveşli Gıda ve İçecek Sanayi ve Ticaret A.Ş. ("Danone Tikveşli") and Numil Gıda Ürünleri Sanayi ve Ticaret A.Ş. ("Numil"). All shares of Danone Hayat, Danone Tikveşli and Numil belong to Danone.

Danone Hayat is active in the field of water production, bottling and sales. Danone Hayat sells bottled and packed water between 0,3 and 19 liters through various distribution channels. Additionally, Danone Hayat also realizes the sale of mineral water through the trademark Akmina.

Further, Danone also controls Holding Internationale de Boissons, based in France.

Transferor. Sirma is a joint-stock company active as per the laws of the Republic of Turkey. Sirma is active in the production of water between 0,33 and 19 liters through factories established respectively in Bursa and Burdur and two factories established in Sapanca, and distributes branded packed water throughout Turkey.

Certain shares of Sırma are held by the Dişli Family, the Karabacak Family and DCEMF Mez Hold BV.

Operation

The transaction consists of the acquisition of 51% of the shares of Sırmaby Danone. Within this scope, Sırma's shares belonging to the members of the Dişli Family will be transferred to Dişli Holding A.Ş. and Sırma's shares belonging to the members of the Karabacak Family will be transferred to Karabacak Holding A.Ş. Both Dişli Holding A.Ş. and Karabacak Holding A.Ş. will be newly established. Following these operations, DCEMF Mez Hold BV will transfer all of Sırma's shares in its possession to Dişli Holding A.Ş. Finally, Dişli Holding A.Ş. and Karabacak Holding A.Ş. will transfer some of Sırma's shares in their possession to Holding Internationale de Boissons, which is controlled by Danone.

In addition to the acquisition of the control of Sırma by Danone, an agreement regarding the use of the intellectual property rights of the brand Sırmakes by Kaynaksu was also signed between Kaynaksu, which is controlled by the Karabacak Family, and Sırma. As per this agreement, Kaynaksu will have the right to produce and sell packed water under the Sırmakes brand respectively in Istanbul, Kırklareli, Edirne and Tekirdağ, and Sırma will have such right for all other regions.

Legal Framework of the Operation

According to Article 5/1(b) of the Communiqué Concerning Mergers and Acquisitions Calling for the Authorization of the Competition Board [1] ("Communiqué No. 2010/4"), "*The acquisition of direct or indirect control over all or part of one or more undertakings by one or more undertakings or by one or more persons who currently control at least one undertaking, through the purchase of shares or assets, through a contract or through any other means provided there is a permanent change in control*" shall be considered as a merger or acquisition within the scope of the Act on the Protection of Competition ("Competition Act"). Article 5/2 of Communiqué no: 2010/4 gives the definition of control. According to this article, "*control may be acquired through rights, contracts or other instruments which, separately or together, allow de facto or de jure exercise of decisive influence over an undertaking. In particular, these instruments consist of ownership rights or operating rights over all or part of the assets of an undertaking, and those rights or contracts granting decisive influence over the structure or decisions of the bodies of an undertaking.*"

In this case, as mentioned above, there is a transfer of shares, since Danone will acquire 51% of the shares of Sırma.

Furthermore, upon analysis of the Shareholders' Agreement signed between the parties on 04.05.2013, it can also be noted that, contrary to Dişli Holding A.Ş. and Karabacak Holding A.Ş, Danone will have a decisive influence over the administration of Sırma. In other words, the control of Sırma will be permanently transferred to Danone by way of share transfer.

In light of the foregoing, the operation between Danone and Sırma is considered as a merger or acquisition, within the scope the Communiqué No. 2010/4.

Threshold System

In accordance with Article 7/1 of the Communiqué 2010/4, the operation is submitted to the authorization of the Board where (a) the total turnovers of the parties in Turkey exceed TRL one hundred million, and turnover of at least two of the parties in Turkey each exceed TRL thirty million or (b) the asset or activity subject to acquisitions, and at least one of the parties merging has a turnover in Turkey exceeding TRL thirty million and the other party has a global turnover exceeding TRL five hundred million.

Considering that in this case the above-stated thresholds are exceeded, the operation was submitted to the authorization of the Board as per the Communiqué No. 2010/4.

Board Examination

In Turkish competition law, merger or acquisition operations are illegal and prohibited which: (1) create or strengthen a dominant position or (2) result in a significant lessening of the competition in the relevant product market.

For that reason, the Board, in order to determine whether the operation between the parties is prohibited within Turkish law, conducted a thorough analysis as follows:

- (i) The Board determined the relevant product market and the affected market subject to said operation;
- (ii) The Board examined whether said operation would create a dominant position or strengthen a dominant position in the relevant product market (1st test) and in the affirmative, whether the operation will significantly lessen the competition in the relevant product (2nd test);
- (iii) The Board examined the ancillary restraints in the Shareholders' Agreement.

Relevant Market

Relevant Product Market

A relevant product market means a market which includes all those products and/or services, which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use. Hence, in determining the relevant product market, the interchangeability or substitutability of the products by the consumer is taken into account.

In addition to the above-stated, according to Paragraph 20 of the Guidelines on the Definition of Relevant Market [2] ("Guidelines"), "...in case the transaction under examination does not pose concerns for competition within the framework of potential alternative market definitions in terms of both product and geography, or in case there are competition distorting effects for all alternative definitions, a market definition may not be prepared."

In this regard, the Board decided not to determine the relevant product market since the operation will not create competition concerns even though the market is defined in the strictest manner. However, the Board did not explain in its decision why the operation will not create such competition concerns, although the Board decisions involved the grounds and the legal basis as per Article 55(h) of the Competition Act. Within this scope, the Board decision is likely to be criticized.

Relevant Geographic Market

A relevant geographic market means a market, which comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous and which can be disassociated from neighborhood markets because competition conditions are sensibly different from there.

In this case, the Board determined the relevant geographic market as Turkey.

Affected Market

The Communiqué No. 2010/4 refers for the first time to the notion of “affected market” and stipulates that in such case the long notification form shall be filled.

The affected market is the relevant product markets that might be affected by the transaction to be notified and where (a) two or more of the parties are commercially active in the same product market (horizontal relationship) or (b) at least of one of the parties is commercially active in the downstream or upstream market of any product market in which another party operates (vertical relationship).

The Board, in this case, determined that there is a horizontal relationship between the parties and thus the affected markets are respectively the “packed water market”, the “aromatized mineral water market” and the “mineral water market”. However, the Board did not define the notion of “affected market” in the decision and did not point out the importance of the affected market within mergers and acquisitions.

Board Analysis and Findings

The Board examined the operation respectively for every affected market:

Packed Water Market. The Board determined that after the acquisition, Danone’s total market share would be 10% - 15% and that Danone would rise to the second rank in the relevant product market. In addition, Nestlé will preserve its dominant position in the packed water market through its brands Erikli ve Pure Life. As to the water cooler bottle market, the Board determined that Danone’s market share will increase to 0,5%.

In light of the foregoing, the Board concluded that the operation would not create a dominant position or strengthen a dominant position in the packed water market.

Mineral Water Market. The Board determined that, after the acquisition, Danone’s total market share would be 5% - 10% and that Danone would be ranked third in the mineral water market after Kızılay and Uludağ. Thus, the Board also concluded that the operation would not create any competition concern in the mineral water market.

Aromatized Mineral Water Market. The Board determined that, after the acquisition, Danone’s market share would be 20%- 30% in the aromatized mineral water market, that the market share of its closest competitor, Uludağ, would be 15%- 20%, followed by Freşa, which will have a market share of 10%- 15%. Thus, the Board concluded that Danone would be in a dominant position in the

aromatized mineral water market.

However, the Board stated that the aromatized mineral water market is a competitive market since it is a fast-growing market and that the market shares of undertakings active in the market vary over the years. Thus, the Board concluded that the operation would not create a dominant position or strengthen a dominant position in the aromatized mineral water market.

In making the decision, the Board applied the two steps test. Hence, the Board first examined the dominant position in conformity with the Competition Act and determined that said operation would create a dominant position in the relevant market. Then, the Board examined whether the competition would be strengthened due to the dominant position and concluded that the dominant position would not significantly distort the competition in the relevant market.

Evaluation of Ancillary Restraints

There are two ancillary restraints within this acquisition: non-compete and non-employment obligations and the restraint of intellectual property rights usage. The most important criterion in order that an ancillary restraint is allowed under Turkish competition law is that the ancillary restraint is directly related and necessary within the merger or acquisition [3].

Non-Compete and Non-Employment Obligations. Even though the operation does not have the characteristics of a joint venture, the Board concluded that the non-compete and non-employment obligations should be considered as ancillary restraints since they are directly related and necessary within the operation of acquisition. Indeed, both Dişli Holding A.Ş. and Karabacak Holding A.Ş. will continue to be the shareholders of Sirma and they will have the right to access Sirma's delicate commercial information.

Restraint of Intellectual Property Rights Usage. This restraint aims to prevent any damage that could be suffered by Sirma and the economic depreciation of the acquisition, which could be caused by the similarity between the names Sirmakeş and Sirma. However, the activities of Kaynaksu in the regions where the water branded Sirmakeş is produced and distributed are not within the scope of this restraint. Moreover, such restriction does not prevent the production and distribution of similar products under another brand. Within this framework, the Board concluded that this restraint is directly related and necessary with regards to this acquisition and thus considered this restraint as an ancillary restraint.

Conclusion

This decision is an extremely important decision in terms of mergers and acquisitions for Turkey since several important matters are examined:

- The affected markets are determined. However, it would be more appropriate if the Board defined this notion and explain its importance within mergers and acquisitions.
- The two-step test is applied and within this scope it is determined that this operation will not cause competition concerns in the relevant market.
- Ancillary restraints are examined and within this scope it is determined that they may be allowed since they are directly related to and necessary for the acquisition.

[1] In order to reach the Communiqué no:2010/4, see: <http://www.rekabet.gov.tr/File/?pat...>

(accessed on: 24.10.2013).

[2] In order to reach the Guidelines, please see: <http://www.rekabet.gov.tr/File/?pat...> (accessed on 25.10.2013).

[3] For further information, please see the article entitled "Non-Compete Agreements" Within Mergers and Acquisitions", <http://www.erdem-erdem.av.tr/en/art...> (accessed on: 01.11.2013).

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