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The Turkish Competition Authority unconditionally clears the acquisition of the hard disk drive business of a leading IT company (Seagate/Samsung)

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The Competition Board (the “Board”) has unconditionally authorized the acquisition of the control over the Hard Disk Drive (“HDD”) of *Samsung Electronics Co. Ltd.* (“*Samsung*”) by *Seagate Electronics PLC* (“*Seagate*”; “*Samsung*” and “*Seagate*” hereinafter referred to as the “Parties”) by concluding that, even though this operation will result in the creation or strengthening of a dominant position, it will not result in the significant lessening of the competition in the relevant product market.

Parties to the Operation

Seagate, which will acquire the control over *Samsung*’s HDD business, is a publicly held company active worldwide in the production, marketing and design of mobile, processing, desktop and consumers’ electronics as well as computer running equipments composed principally of HDD and hybrid HDD. *Seagate* also produces registry media for thin-film and disk read and write heads in order to use them within the HDD.

As for *Samsung*, which will transfer the control over its HDD business, it is worldwide active in the marketing, production and design of HDD for computers systems, sub-systems or consumers’ electronic equipments and the sale of these products to Special Product Producer and Special Design Producer companies.

Object of the Operation

Within the scope of the asset assignment contract signed between the Parties on 19.04.2011, *Samsung* will transfer the control over the HDD business to *Seagate* and will acquire, at the end of

the operation, part of *Seagate*'s current shares.

The assets subject to acquisition consist of some factories, equipments and other tangible and intangible assets exclusively used by *Samsung* and pertaining to or rent by *Samsung* and used in the research, development and sale of HDDs.

The said operation will neither create any modification in the shareholding structure of *Seagate*, nor in the ownership, control and administration system of *Samsung*.

Legal Framework of the Operation

Article 5 of the Communiqué No. 2010/4 Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board [1] (the "Communiqué No. 2010/4") enumerates the cases considered as a merger or an acquisition. As per this article, "*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*" constitutes a merger or an acquisition.

Furthermore, pursuant to the Communiqué No. 2010/4, operations considered as a merger or acquisition are subject to the authorization of the Board on condition that (1) the total turnovers of the transaction parties in Turkey exceed TRY one hundred million, and turnovers of at least two of the transaction parties in Turkey, each exceed TRY thirty million or (2) the worldwide turnover of, one of the transaction parties, exceeds TRY five hundred million, and at least one of the remaining transaction parties has a turnover in Turkey, exceeding TRY five million.

Within the said situation, *Samsung* will transfer the control over HDD business to *Seagate* through a contract. Therefore, the operation between the parties is considered as a merger or an acquisition in accordance with Communiqué No. 2010/4. Moreover, this operation is also subject to the authorization of the Board since the thresholds stated above are exceeded.

Board Analysis and Findings

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

For that reason, the Board, in order to determine whether the operation between the Parties are prohibited within Turkish law, has respectively realized a thorough analyses as follows:

- ▶ (i) The Board has determined the relevant product market subject to the said operation;
- ▶ (ii) The Board has examined whether the said operation will create a dominant position or strengthen a dominant position in the relevant product market (1st test);
- ▶ (iii) The Board has determined whether the operation will significantly lessen the competition in the relevant product market since it creates or strengthens a dominant position in that market (2nd test).

Thus, the Board has separately applied, within this case, both tests foreseen under competition law although it normally does not strictly apply the tests. Indeed, Board decisions do generally not

include concrete parameters related to these tests; even in some decisions, the creation or strengthening of a dominant position is considered, without any ground, as the “significant lessening of competition”. For instance, the Board, in its decision dated 08.07.2010 and numbered 10-49/900-314 [2] related to the acquisition of *Burgaz Alcoholic Beverages Commercial and Economic Union*, which the Saving Deposit Insurance Fund offered for sale, by *Mey İki Sanayi ve Ticaret A.Ş.* (“*Mey İki*”), decided that *Mey İki* was in dominant position in the markets for raki and gin and that *Mey İki* will significantly lessen the competition in the market by strengthening its dominant position through this acquisition. Within this scope, the Board conditionally authorized the said operation [3].

Determination of the 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.

Within this scope, the Board has first determined that HDDs are used in different technological areas such as “desktop applications”, mobile applications” and “products produced within consumers’ electronics”. Nevertheless, since the HDDs constitutes as a whole the object of the acquisition, the Board has not taken into consideration the HDDs’ usage in different technological areas and only attributed the relevant product market as “all HDD products”.

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 competitions conditions are sensibly different from there.

Within this scope, even though the Board considered that the relevant geographical market shall be taken into account globally for reasons such as the structures of prices and demands, the Board has determined the relevant geographical market as “Turkey” since it has fixed that in Turkey, market’s structure is different from other markets.

Dominant Position Test

The Board has expressed that a market share superior to 50% may represent, except for some cases, the existence of dominant position and examined, within this scope, the market shares of the Parties between 2007 and 2010 respectively in the the HDD general market and in the markets for mobile, desktop applications and corporate solutions.

The Board, as a result of the examination that it has conducted, decided that *Seagate* will acquire an important market power within Turkey.

As it can be seen, the Board does not clearly determine whether *Seagate* will be in dominant position or will strengthen its dominant position after the acquisition. The Board has probably not clearly concluded whether *Seagate* will be in dominant position or will strengthen its dominant position after the acquisition because their consequences are almost the same. As a matter of fact, in any case, the second test will apply. However, even if the consequences are the same, it would have been better if it had been clearly determined whether *Seagate* would be in dominant position or strengthen its dominant position after the acquisition to ensure the clarity and definiteness in law.

Significant Lessening of Competition Test

The Board, in order to determine whether the said operation will cause a significant lessening of competition in the relevant market, has taken into account various criteria.

Positive Effects to be Created in the Relevant Product Market by the Operation

The Board, as a result of interviews realized with undertakings, has concluded that, except national computer producers, most of the undertakings will not be negatively influenced by this operation. Indeed, even after the operation, both *Western Digital* and *Toshiba* will continue to be important actors in the relevant product market. Moreover, the fact that HDD's costs are low within final products and that price differences between HDD producers are extremely low will reduce negative effects of the operation in competition.

Negative Effects to be Created in the Relevant Product Market by the Operation

The Board, as a result of interviews realized with undertakings, has determined that the said operation may reduce the negotiating power of computer producers which particularly use HDD products and intermediate products from the point of view of price and supply.

Effects of the Operation on Potential Competition

The Board has determined that, in the coming years, there may be some alternative products for HDDs. As a matter of fact, the Board has identified the Solid State Drive ("SSD") as a new technology that can enter into the market powerfully by reason of its superior characteristics such as its rapidity, resistance and battery life in comparison to HDDs.

In addition to SSD technology, the Board has also identified the "cloud computing" technology, which corresponds to the storage of data in the server of data processing companies in lieu of physical servers of users as an alternative to the HDDs in the next year.

Finally, the Board has determined that in the coming years the effects of HDDs will diminish in the market and that SSDs will be an important alternative.

Effects of Foreign Market in Internal Market

The Board, by taking into account that the parties of the said operation produce abroad and sell the

products in Turkey through distributors or intermediates, that the operation is globally realized and that unconditional authorization was granted by eleven competition authorities including USA, EU, South Korea and Japan, determined that a more competitive market structure will be established in Turkey subject to the modifications of the market conditions in the world even if the Turkish market is actually different from other markets.

Conclusion

The Board, as a result of the examination realized, unconditionally authorized the said operation by determining that, even though the operation will have negative effects on competition, these effects are not in the dimension to “significantly lessen competition”.

The said decision is an extremely important decision for Turkey since the Board applies separately the two tests stated in the Communiqué No. 2010/4 and thus reaches a decision. Moreover, the Board clearly establishes the criteria to be considered in determining whether the competition will be significantly lessened after an operation of merger or acquisition (2nd test).

[1] Please see the following link to access the Communiqué No. 2010/4:
<http://www.rekabet.gov.tr/dosyalar/...pdf> (accessed on: 31.05.2012).

[2] Please see the following link to access the Board’s decision:
<http://www.rekabet.gov.tr/dosyalar/...> (accessed on: 31.05.2012).

[3] For more information on the conditional authorization given by the Board to Mey İçki, please see our Newsletter article dated July 2010 on the following link: <http://www.erdem-erdem.av.tr/newsle...> (accessed on: 31.05.2012).

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