

The Turkish Competition Board clears a merger in view of coordination effects (Promak / Akpol)

Turkey, Mergers, Price coordination, Change of control, Clearance Phase I (merger), Energy

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The Competition Board (“Board”) in its decision dated 02.12.2015 and numbered 15-42/687-244 (“Decision”) analyzed the notification of a transaction, which requires the authorization of the Board in order to gain validity pursuant to Art. 7 of the Act on the Protection of Competition dated 07.12.1994 and numbered 4054 (“Competition Act”).

Parties of the Transaction

The transaction is regarding the purchase of forty percent of the shares of Promak Enerji Sanayi ve Ticaret A.Ş. (“PROMAK”) that is owned by Prima Energy Trading LLC (“PET”), by Akpol İnşaat Mühendislik Proje ve Ticaret A.Ş. (“AKPOL”). PET is controlled indirectly by Gazprom Export LLC (“GAZPROM”) (“Transaction”).

Background of the Transaction

The adoption of Natural Gas Market Law numbered 4646 aimed to established a transparent and competitive market. Thereafter, Boru Hatları Taşımacılık A.Ş. (“BOTAS”) executed natural gas sale agreements with GAZPROM. With these agreements, the liberalization of the market commenced. Within this context, by way of importer companies, such as ENERCO, AVRASYA, AKFEL, natural gas is supplied to Turkey with long-term agreements.

The Board, with its decision dated 18.07.2013 and numbered 13-46/585-256, authorized the transaction where PET and AKPOL acquired the joint control of Enerco Enerji Sanayi ve Ticaret A.Ş. (“ENERCO”) and Avrasya Gaz A.Ş. (“AVRASYA”) by establishing joint control over PROMAK. AKPOL and PET executed a Sale and Purchase Agreement that includes a call option for each party. This call option can be used for two years following the share transfer. With the notification in question, AKPOL wishes to purchase forty percent of the shares of PROMAK from PET on grounds of the Sale and Purchase Agreement.

Change of Control

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The Board primarily evaluated the shareholding structure before and after the Transaction. The Decision determined that following the Transaction, AKPOL will acquire full control over PROMAK. Further, it is also established that PROMAK is not engaged in any business activity in any market.

As a result of this Transaction, the controlling party of ENERCO and AVRASYA shall change. The Baltacı Group, who will fully control PROMAK through AKPOL, shall also acquire the control of ENERCO and AVRASYA through PROMAK. Additionally, the Baltacı Group has full control of Akfel Gaz Ticaret Sanayi A.Ş. (“AKFEL”) that operates in the market, as well. The Board decided that the control mechanism of PROMAK, ENERCO and AVRASYA will change; therefore, this Transaction is considered as a merger under Art. 5 of the Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board numbered 2010/4 (“Communiqué”). Further, such Transaction exceeds the thresholds listed under Art. 7 (a) of the Communiqué.

The Board, considering the market shares of ENERCO, AVRASYA and AKFEL, concluded that this Transaction would not constitute, nor strengthen, a dominant position, and therefore, competition would not be eliminated.

Coordination among Companies

In its Decision, the Board stated that the Transaction should also be evaluated in terms of coordination effects. In its decision numbered 13-46/585-256 the Board stated that subject to the decision, the transaction could lead to cooperative behaviors of the four largest companies after Boru Hatlarıyla Tasımacılık A.S (“BOTAS”) among eight importer companies.

This cooperation risk brings the issue to an important point in terms of Art. 4 of the Competition Act. The Board points out that apart from the number of companies that are involved, market shares of the parties and their potentials should also be taken into consideration. At this point, Board states that liberalization of the market reduces the indicative character of market shares. Therefore, the Board finds that the shares of the parties within the import agreements are more useful in interpreting the current condition, as well as for future indications. It has been established that in accordance with the aimed market structure, if the share of the importer companies’ agreements that are engaged with cross-partnerships among the long-term import agreements is above twenty percent, the risk of competitive behavior shall arise. Therefore, the transaction is considered to be within the scope of Art. 4 of the Act. The Board decided that the shares of the four companies that are involved is below twenty percent in that event there would not be a risk of coordination.

In the Decision, it has been established that the above explanations from decision numbered 13-46/585-256 are effective. It is foreseen that the total shares compromising the cross-shareholding of BOSPHORUS, AVRASYA, ENERCO and AKFEL will decrease following the Transaction (with the elimination of GAZPROM’s control through PROMAK and PET). Therefore, the coordination risk among companies will diminish.

GAZPROM is Turkey’s largest gas supplier. With the Transaction, GAZPROM will transfer control of two of the importer companies; therefore, the risk of anti-competitive behavior will be reduced. GAZPROM is also a major gas producer that has the market power to establish gas prices. The Board concluded that if GAZPROM continues to control those two companies, such two importer companies that are subject to the Transaction would have a tendency to purchase gas from GAZPROM. Within

this context, the transfer of GAZPROM shares, in a way eliminating its control, will create a free environment for the importer companies in their future gas purchases.

Conclusion

In light of the above explanations, the Board decided that the Transaction will not prevent, nor restrict, competition. In this Decision, the Board shows its attitude towards GAZPROM, and in a manner of speaking warns GAZPROM with respect to its future actions. The Board's reasoning, as explained above, indicates how it will interpret future transactions in which GAZPROM is a direct or indirect party.

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