

## The Turkish Competition Board Rejects an acquisition of the Marinas (Beta Marina / Setur)

**Turkey, Mergers, Abuse of dominance, Relevant market, Geographic market, Prohibition (mergers), Services**

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The Competition Board (“Board”) has rejected the acquisition of the full shares of Beta Marina Liman ve Çekek İşletmesi A.Ş. (“Beta Marina”) and Pendik Turizm Marina Yat ve Çekek İşletmesi A.Ş. (“Pendik Turizm”) by Setur Servis Turistik A.Ş. (“Setur”) in accordance with Art. 7 of Act No. 4054 on the Protection of Competition (“Competition Act”) in its decision [1] dated 09.07.2015 and numbered 15-29/421-118.

### Parties of the Transaction

Pursuant to the information examined by the Board, the acquired party, Setur, was incorporated within Koç Holding A.Ş. (“Koç Holding”) in 1965, and is active in the tourism sector. Koç Holding operates nine marinas, two of which operate under joint control.

One of the acquired parties, Beta Marina, is indirectly embodied within Yıldız Holding A.Ş., and operates the marina by means of leasing. The other acquired party, Pendik Turizm, is also indirectly embodied within Yıldız Holding A.Ş., and currently holds a utilization permit from Istanbul City Port Marina, and leases this marina to Beta Marina.

### Legal Framework of the Transaction

The acquisition of the full control of Beta Marina and Pendik Turizm by Setur is an acquisition transaction within the framework of Art. 5 of the Communiqué Concerning Mergers and Acquisitions that Call for the Authorization of the Competition Board [2] (“Communiqué No. 2010/4”) and Art. 7 of the Competition Act. Since the transaction exceeds the turnover thresholds specified under Art. 7 of Communiqué No. 2014/4, it is subject to the Board’s authorization.

As per Art. 7 of the Competition Act, merger or acquisition transactions by any undertakings with a view to creating a dominant position or strengthening the current dominant position, which would result in significant lessening of competition, is prohibited.

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When the prohibition regulated under Art. 7 of the Competition Act, and the term of dominant position defined in Art. 3 thereof are considered as a whole, merger and acquisition transactions that are subject to the Board's authorization as per Communiqué No. 2010/4 should be assessed in terms of whether the undertakings, individually or mutually, reach the power referred to in the terms of dominant positions, or whether or not to increase such power that exists prior to the transaction.

In this decision, the Board examined whether or not the acquired party would have a dominant position in the related market that would result in significant lessening of competition as a result of this acquisition transaction that is subject to authorization.

## **Relevant Market**

**Relevant Product Market.** A relevant product market is comprised of the products or services that may be regarded as interchangeable or substitutable by the consumer due to the products' properties, prices, and intended use. Hence, in determining the relevant product market, the interchangeability or substitutability of the products by the consumer is taken into account.

As per the Guidelines on the Definition of the Relevant Market [3], the Board evaluated whether services that are rendered by marinas constitute different relevant markets, since they are not substitutable in terms of their intended purposes and properties from the view of customers. In this respect, sea services, land services and leasing services that are provided in marinas have been evaluated, severally.

**Relevant product market with regard to sea services.** Whether mooring services rendered in boat parks and fishing ports are substitutes to marina mooring services was evaluated. Concerning mooring services, it has been decided by the Board that boat parks are interchangeable with marinas in terms of their prices, intended purposes, and properties by customers and, thus, they may be evaluated within the same relevant product market. However, the Board has determined that fishing ports are not interchangeable with marinas, and are not allowed within the same relevant product market.

**Relevant product market with regard to land services.** Marina land services are limited to boatyard services. The Board is of the opinion that there is no defining element of boatyard services that are provided by marinas in land fields from which to distinguish boatyard services offered by other facilities.

**Relevant product market with regard to leasing services.** Whether or not field leasing services rendered by marinas are substitutes for land leasing services rendered by entity consumers, other than marinas, has been examined, and it has been concluded that with regard to leasing services, there is no need to limit the relevant product market definition concerning leasing services offered by marinas.

In light of the foregoing, the Board has defined the relevant product markets as "*mooring services rendered in marinas and boat parks,*" "*boatyard field services market,*" and "*field leasing services market.*"

**Relevant Geographic Market.** Relevant geographic markets are areas in which undertakings are

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given 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, as the conditions of competition differ considerably therefrom. The relevant geographical market analysis for the purposes of this transaction has been separately identified in terms of the relevant product services that are separately defined as mooring services rendered in marinas and boat parks, boatyard field services markets, and field leasing services markets.

**The geographical market with regard to mooring services rendered in marinas and boat parks.** Beta Marina, which is one of the companies that is subject to transfer within the scope of the transaction, is the operator of Istanbul City Port Marina in Istanbul, Göcek Village Port, and Göcek Exclusive Marina, all of which are located in the Aegean region. The geographical market analysis with regard to such marinas has been separately considered. For the Istanbul City Port, the relevant geographical market has been defined as the “*districts of Adalar, Ataşehir, Beşiktaş, Beyoğlu, Çekmeköy, Kadıköy, Kağıthane, Kartal, Maltepe, Pendik, Sancaktepe, Sultanbeyli, Şişli, Tuzla, Ümraniye and Üsküdar,*” and for Göcek Village Port Marina and Göcek Exclusive Marina, it has been defined as the “Aegean and Mediterranean Sea coastal line.” However, a specific determination of the relevant geographical market was found to be unnecessary, since a narrow determination would not substantially change the evaluation of concentration.

**The geographical market with regard to boatyard field services.** For Istanbul City Port Marina, the relevant geographical market has been determined as “the cities bordering the Marmara Sea.” On the other hand, since the assessment would not be affected by different determinations of the relevant geographical market, a specific determination of the relevant geographical market was deemed unnecessary for these marinas in terms of boatyard field services. **The geographical market with regard to field leasing services.** Although the definition of the relevant geographical market has been considered as “Turkey,” a specific determination of the relevant geographical market was deemed unnecessary since even a narrow city-based or side-based determination for Istanbul would not affect the concentration evaluation.

## Evaluation of Concentration

The Board has severally addressed the evaluation of concentration, separately, in terms of the relevant product market:

**Mooring services rendered in marinas and boat parks.** In terms of Istanbul City Port Marina, if this acquisition is realized, the Board has specified that the market ratio of the marinas in the relevant market, and which is controlled by Koç Holding, will reach 60-65% in accordance with the figures from 2014. Therefore, it has been interpreted that this acquisition transaction would create competitive concerns.

The Board has reflected its concerns that as a result of this acquisition transaction, Koç Holding will take the control of Istanbul City Port Marina, which is the closest rival of Kalamış Marina, operated by Koç Holding, as well; thus, the compound undertaking to be formed will hold significant market power in the relevant market, and it may use its market power in order to increase prices.

Nonetheless, in the alternative geographical market definitions that might be made for Göcek Village Port Marina and Göcek Exclusive Marina, it has been deduced that the transaction would not

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cause a significant increase in concentration in terms of the relevant product market.

**Boatyard field services.** In terms of the boatyard field services rendered in the cities bordering the Marmara Sea, the market shares of the parties prior to the transaction, and the market share of the compound undertaking to be formed following the transaction, were evaluated. Additionally, it has been concluded that immediately following the transaction, the customers of the compound undertaking would have the opportunity to lean towards rival undertakings due to the high number of undertakings that will operate in the relevant market after the acquisition, the substitution level of services of the rival undertaking compared to services of the compound undertaking, and the rivals' adequate capacity to meet the demands of customers who reject potential high pricing of the compound undertaking. This situation may dampen the compound undertaking's motive to increase prices. On the other hand, in the alternative geographical market, definitions that might be made for Göcek Village Port Marina and Göcek Exclusive Marina are that the transaction would not cause a significant increase in concentration in terms of the relevant product market.

**Field Leasing Services.** In terms of the alternative geographic market definition for Istanbul City Port Marina, Göcek Village Port Marina, and Göcek Exclusive Marina, it has been emphasized that no significant concentration increase would be created.

## Conclusion

As a result of its examination, the Board has decided that the acquisition of the full shares of Beta Marina and Pendik Turizm by Setur was subject to authorization under Communiqué No. 2010/4, and that the transaction in question should be rejected pursuant to Art. 7 of Act No. 4054, since it would lead to Koç Holding acquiring the dominant position in the relevant market defined in relation to the Istanbul City Port Marina and, therefore, would significantly lessen competition in the market.

On the other hand, this decision of the Board is criticized in the Justification of the Dissenting Vote in respect to specification of the relevant product and geographical market, the determination of whether the turnover thresholds have been exceeded or not, and the soft possibilities and assumptions that the prohibition of this transaction is based on. Additionally, not granting authorization to the acquisition transaction, by reasoning that the Kalamış and Fenerbahçe Marina is not legally owned by Setur, and its disembarkation depends on the consent of another institution, is not approved, and is noted in the Justification of the Dissenting Vote, as well.

This decision of the Board is substantial in respect to the mergers and acquisitions realized in Turkey, especially for marina operational activities that are conducted in Turkey. Hence, there are some Board decisions that reject these types of mergers and acquisitions, and the reasons for rejection underlying this decision set a precedent for other merger and acquisition transactions. However, as emphasized in the Justification of the Dissenting Vote, some major errors are observed concerning the decision of the Board, such as: (1) The specifications concerning the relevant geographical market remain ambiguous. When determining the relevant geographical market, some of the mooring agreements signed by marina and boat parks have been left out of the assessments for certain reasons, thus only 41% of the mooring agreements have been taken into account in the assessment of the relevant geographical market. Then, in the assessment of the relevant geographical market, in terms of the marinas located in Istanbul, the districts that are 40 km away from a marina have been considered within the scope of the relevant market. Also, despite two of the

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three marinas that are the subject of the transaction are located in Göcek, no relevant geographical market for these marinas are specified. (2) Whether the fishing ports being considered as substitutes or not have not been sufficiently searched. (3) The newly built Tuzla Marina that is located in the same geographic market as Pendik Marina has been put into service; yet, the effects of the new marina have not been taken into account. (4) Due to the ambiguities that remain in the definition of the relevant geographic market, whether or not the transaction being subject to the Board's authorization in respect of exceeding the turnover thresholds are deemed as uncertain. (5) Setur's waiver from the right to operate the Kalamış and Fenerbahçe Marinas as a reason for the concentration has not been taken into account. In the event the Kalamış and Fenerbahçe Marinas were not considered to be under the control of Setur, the market share and the concentration ratio would have been assessed to be less.

[1] Please see. <http://www.rekabet.gov.tr/File/?pat...>.

[2] Please see. <http://www.rekabet.gov.tr/File/?pat...>.

[3] Please see. <http://www.rekabet.gov.tr/File/?pat...>.

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