

The Turkish Competition Board Imposes fine for failing to notify of the establishment of a joint venture (Anayurt)

Turkey, Mergers, Joint-venture, Notification (mergers), Sanctions / Fines / Penalties, Coal and steel

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The Competition Board (“Board”) analyzed in its decision dated 25.06.2014 and numbered 2014-1-47 (“Decision”) that, whether (1) the establishment of a joint venture entitled Anayurt Kömür Madencilik Sanayi ve Ticaret A.Ş. (“Anayurt”) is in compliance with Art. 7 of the Act on the Protection of Competition No. 4054 (“Competition Act”) and the Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board No. 2010/4 (“Communiqué No. 2010/4”) and (2) whether failing to notify the said joint venture to the Board constitutes sufficient grounds to impose an administrative fine in accordance with Art. 11(a) and Art. 16 of the Competition Act. After examination, the Board imposed a fine upon the parties on the grounds of failure to notify of an acquisition that is subject to the authorization of the Board.

The Board concluded that no dominant position was created or strengthened by this transaction that would result in significant lessening of competition, and gave authorization to the establishment of Anayurt. Therefore, the compatibility of the transaction with Art. 7 of the Competition Act will not be dealt with in this Article.

Legal Framework of the Failure to Notify

In accordance with Art. 5(3) of Communiqué No. 2010/4, each of the parties to the transaction with respect to formation of a joint venture is considered to be the acquiring party. In the formation of Anayurt, all of the acquiring parties are real persons; namely, Ali Murat Ersoy, Hazim Sesli, Mehmet Sesli and Abdülkadir Sesli (the last three acquirers are referred to as the “Sesli Family” throughout the Decision and hereunder). In the decision dated 25.06.2014 and numbered 14-22/421-185 [1] of the Board concerning the examination of the purchase of 33% of Anayurt’s shares by Mahmut Can Çalık, it was noted that the Board has not yet been notified of the establishment of Anayurt.

• First, the Board examined whether a transaction that must be notified exists in accordance with the Competition Act or any secondary legislation. Art. 5(3) of Communiqué No. 2010/4 states that “

formation of a joint venture that would permanently fulfill all of the functions of an independent economic entity shall constitute an acquisition transaction...,” meaning that establishing a joint venture is considered to be an acquisition under certain conditions. Art. 7 of the Competition Act stipulates that certain types of acquisitions that are specified by the Board through communiqués shall be notified. The Board took two criteria into consideration when evaluating whether or not the transaction may be considered as an acquisition within the scope of Communiqué No. 2010/4:

o **Existence of a joint control over the related undertaking.** The Board examined that Ali Murat Ersoy and the Sesli Families each hold 50% of the shares of Anayurt. Hazim Sesli is the Chairman, and Ali Murat Ersoy is the Deputy Chairman of the Board of Directors. According to Anayurt’s Articles of Association, the Board of Directors has two members, and both members must be present, and cast affirmative votes in order for the Board of Directors to convene and make a decision. In the light of above, the Board decided that Anayurt is jointly controlled by Ali Murat Ersoy and the Sesli Family.

o **Joint venture being an independent economic entity.** The Board stated that Anayurt was established permanently, and it acquires operating and mineral exploration licenses, and performs all kinds of mining activities. The Board come to the conclusion that Anayurt was established to perform activities as a permanent player at the market, and has the characteristics of an independent economic entity.

- Secondly, the Board stated that since the thresholds stipulated under Art. 7(1) of Communiqué No. 2010/4 are exceeded, the related acquisition requires the authorization of the Board to carry legal validity.

- Thirdly, the Board referred to Art. 11 of the Competition Act stating that *“Where a merger and acquisition transaction whose notification to the Board is compulsory is not notified to the Board, the Board shall deal with the merger or acquisition under examination on its own initiative, when it is informed about the transaction anyway. As a result of the examination: (1) it allows the merger or acquisition if it decides that the merger or acquisition does not fall under the first paragraph of Article 7, but imposes fines on those concerned due to their failure to notify...,”* meaning that the relevant acquisition shall be allowed, yet the acquiring parties are subject to be fined, accordingly.

Evaluation of the Acquiring Parties’ Arguments

- **A single transaction argument.** The acquiring parties have claimed that the establishment of Anayurt (“first transaction”), and the above-mentioned transaction where Mahmut Can Çalık acquired 33% of Anayurt’s shares (“second transaction”) shall be considered as a single transaction; so that the notification made for the second transaction would also cover the first transaction. Pursuant to Art. 8(5) of Communiqué No. 2010/4, *“Two or more transactions under paragraph 2 of this Article, carried out between the same persons or parties within a period of two years shall be considered as a single transaction for the calculation of turnovers listed in Art. 7 of Communiqué No. 2010/4”*. However, as to the Board, the parties to both transactions are different. For the first transaction, the parties are Ali Murat Ersoy and Sesli Family whereas for the second, they are Ali Murat Ersoy, Sesli Family and Mahmut Can Çalık. Furthermore, the Board decision authorizing the second transaction also states that Anayurt’s acquisition of Başkent Gölbaşı Maden Enerji Kömür

Elektrik Üretim ve Sanayi Ticaret Ltd. Şti. (“Gölbaşı”) (“third transaction”) is not subject to authorization. The Board indicated that the transferring party to this transaction is Borusan Holding A.Ş. and Borusan Danışmanlık ve Ortak Hizmetler A.Ş. and Anayurt is the acquiring party. In sum, the Board examined that these two transactions cannot be considered as a single transaction since the parties to both are different.

• **Closely related transactions argument.** The acquiring parties have also claimed that in accordance with Art. 5(4) of the Communiqué No. 2010/4, the first transaction and the third transaction shall be accepted as closely related, so that the first transaction would also not be subject to authorization. The above stated provision reveals that *“Closely related transactions which are tied to conditions or which are realized rapidly through securities within a short period of time shall be considered as single transactions under the scope of this Article.”* The Board made references to the Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control (“Guidelines”) [2] when explaining the concept. Three criteria were taken into account:

o The Guidelines state that *“interdependency of the transactions means that considering the reason underlying the transaction and the economic aim of the parties, the transactions are interdependent in such a way that one transaction cannot be realized without the other and that they change the market structure together.”* Unless certain transactions are interdependent, they shall be considered as separate. The Board stated that the first and third transactions are not interdependent.

o Secondly, the Guidelines emphasizes that *“different transactions, even if they are conditional upon each other, control should be acquired by the same undertaking(s) so that they can be treated as a single concentration.”* As mentioned in the explanation of the previous argument, the Board evaluated that the parties to the first and third transactions are different.

o Lastly, the requirement of conditionality is indicated in the Guidelines meaning that *“none of the transactions would take place without the others and they, therefore, constitute a single transaction. This is the case where the transactions are de jure and mutually linked. Moreover, if de facto mutual conditionality can be satisfactorily demonstrated, it may also suffice for treating the transaction as a single concentration.”* In order to prove that the transactions are not de jure linked, the Board put forward that the first and third transactions were not performed at the same time. Pursuant to one of the Board’s decision, simultaneity is required as a condition for accepting the two different transactions as a single transaction [3]. In addition, non-existence of de facto mutual conditionality is proven by the fact that Anayurt started operating right after its establishment. Therefore, Anayurt did not need the acquisition of Gölbaşı in order to be active in the market. Even though the parties claimed that Anayurt did not engage in any commercial activity since its establishment, and did not have any turnover or market share; the Board assessed Anayurt as an independent economic activity. Economic independence was defined in the Decision as having sufficient resources to perform activities with the aim to establish a permanent place in the market. Therefore, this argument was not found applicable by the Board, as well.

Conclusion

In conclusion, the Board imposed a fine equal to 15,226 TRY upon Ali Murat Ersoy and the Sesli Family, respectively. Additionally, Hazim Sesli, Mehmet Sesli and Abdulkadir Sesli were held jointly responsible for the payment of the fine imposed upon the Sesli Family. The decision is significant for

certain reasons, as follows:

- The Board put forward the condition by which a joint venture is considered as an acquisition within the framework of the Competition Act. The existence of joint control and being an independent economic entity are the preconditions for a joint venture to be acknowledged as an acquisition. As stated, above, even though the parties claimed that Anayurt did not engage in any commercial activity since its establishment, and did not have any turnover or market share; the Board assessed Anayurt as an independent economic activity. Conversely, as per the decision dated 16.07.2014 and numbered 14-24/488-218 [4] of the Board, the newly formed enterprise was not deemed as a fully functioning joint venture that performs all functions of an independent economic entity permanently.
- After accepting the establishment of Anayurt as an acquisition transaction, the Board examined two arguments presented by the parties. First, a single transaction argument was examined and rejected by the Board on the grounds that the parties to the examined transactions are different, meaning that these transactions cannot be accepted as a single transaction.
- Secondly, the Board evaluated the closely related transactions argument. In its evaluation, the Board took three factors into account: the interdependency of the transactions, whether the acquisition is being performed by the same parties, and whether the transactions are *de jure* or *de facto* linked. The last criterion is also important since the Board defined economic independence as a part of its examination.

After refuting the foregoing arguments, the Board found that Anayurt's establishment was subject to authorization; however, the parties failed to notify of the acquisition; therefore, a fine was imposed on the parties for their failing to notify. The Decision is significant because it provides a clear example of how the principles set forth in the Guidelines is applied to a specific case.

[1] For the Decision, please see: <http://www.rekabet.gov.tr/File/?pat...>

[2] For the Guidelines, please see: <http://www.rekabet.gov.tr/File/?pat...>).pdf

[3] Please see Board's decision dated 31.05.2012 and numbered 12-29/849-249 for the condition of simultaneity.

[4] For the Decision, please see: <http://www.rekabet.gov.tr/File/?pat...>

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