The Turkish Competition Authority approves a joint venture in the construction services market (Goldman Sachs-TAV Yatýrým Holding)

Turkey, Mergers, Joint-venture, Effect on competition, Financial services

In its decision dated 12 June 2008 and numbered 08-39/513-188, Turkish Competition Board (hereinafter referred as "Board") unconditionally cleared the creation of a joint venture between Goldman Sachs International Bank (hereinafter referred as "Goldman Sachs") and TAV Yatýrým Holding A.P. by acquisition of 33,34 % of shares of TAV Tepe Akfen Yatýrým Ynþaat ve Ýþletme A.P. (hereinafter referred as "TAV"), the joint venture company (hereinafter referred as "JVC") by Goldman Sachs.

The purpose of the concentration was to transfer the 33,34 % of the shares of JVC owned by TAV to Goldman Sachs and to create a joint venture with the joint control of the parties. The transaction contains two stages: The first stage is related to the transfer of the shares of JVC to Goldman Sachs and the second stage concerns the acquisition of joint control on JVC following the transfer of shares.

Determination of the relevant market

Taken into consideration the commercial activity of the JVC, the Board defined the relevant market as the construction services market within the boundaries of the Turkish Republic.

Board's findings and the creation of the joint venture

The Board ruled at first hand, that the acquisition falls with in the scope of Communiqué n° 1997/1 on the Mergers and Acquisitions Calling for the Authorization of the Competition Board (hereafter "Communiqué n° 1997/1") article 2 point (c).

The provision of the article 2 point (c) titled "Cases Considered as a Merger or an Acquisition" is as follows [1] :

"As the following points are deemed as mergers and acquisitions between undertakings under Article 7 of the Act, and considered to fall under this Communiqué, the authorization of the Competition Board should be taken depending on the conditions in Article 4 of the Communiqué : ...

...c) Joint ventures which emerge as an autonomous economic entity possessing labor and assets to achieve their goals, and which do not have the aims or effect of restricting competition between the parties, or between the parties and the joint venture".

According to the above stated article, a joint venture has to satisfy the following requirements in order to be approved as a merger or an acquisition, which may fall within the scope of the Communiqué n°1997/2 :

There has to be an entity under joint control,

The joint venture has to be an autonomous economic entity,
The joint venture should not have the aim or effect of restricting competition between the parties or between the parties and the joint venture.

The Board examined these three requirements in detail:

**Joint control**

The Board underlines that the joint control exists in cases where two or more undertakings or persons have the powers to exercise decisive influence over another undertaking. In accordance with this definition, the decisive influence means the power to block actions which determine the strategic commercial behavior of the said undertaking.

The Board states that the main evidence of a joint control is the existence of two or more undertakings or persons having equal voting rights, equal rights in composition of the decision making bodies of the undertaking, which is determined by both legal and factual considerations.

In the transaction subject to this decision, the Board underlines that, at first sight, such transaction may not cause joint control of JCV. However, the Board further states that, in order to make a conclusion regarding the existence of joint control, the Shareholders Agreement ("SHA") signed between Goldman Sachs and TAV should also be examined. Article 6 of the SHA regarding the composition of the board of directors of JVC (maximum 6 directors) provides the following structure:

- **TAV** will nominate minimum 4 directors as long as TAV owns 51% of the shares,
- **Goldman Sachs** will nominate minimum 2 directors as long as Goldman Sachs owns 15% and minimum 1 director as long as Goldman Sachs owns 10% of the shares

In addition, JVC's board of directors shall not have a meeting without the participation of the director nominated by Goldman Sachs. If a board of director's meeting is annulled because of non-participation of the director nominated by Goldman Sachs, for the second meeting the same condition shall not be required. However, in any case the board of directors shall not take any resolution regarding the long term and strategic behavior of the company in the absence of the directors nominated by Goldman Sachs. There are also similar provisions regarding the shareholders' meetings.

The following decisions are listed in the SHA as the "long terms and strategic behavior decisions":

- Nomination and removal of the CEO and CFO,
- Approval of the budget,
- Amendments on the budget and business plan,
- Important partnership, joint venture, distribution of dividends, license and cooperation agreements,
- Amendments on the articles of association and other corporate documents
In the light of the foregoing, the Board concluded that Goldman Sachs and TAV will exercise decisive influence over JVC. Thus, JVC will be under the joint control of TAV and Goldman Sachs.

**Autonomous economic entity**

The Board states that the joint venture must have its proper management dedicated to its day-to-day operations. The management should have sufficient resources including finance, staff, and assets. Therefore the joint venture has to operate in the same manner as the other companies active in the same relevant market. The same requirement is also underlined in the EC Merger Regulation [2], paragraph 27 [3].

In our case, as the JVC is an already incorporated company; the Board concludes that the JCV is an autonomous economic entity.

**Not having the aim or effect of restricting competition between the parties or between the parties and the joint venture**

It is generally accepted in the Turkish Competition Law that where a joint venture is created and only one or none of the parent companies is present on the same market under the transaction, it is presumed that there is no risk of coordination of competition.

In the decision, the Board examines that Goldman Sachs has no activity in the construction market and the other parent, TAV, has only a few shopping mall constructions outside the boundaries of the Turkish Republic and its main field of activity is airport construction within the Turkish Republic and abroad. The Board also underlines the article 2.4 of the SHA preventing any activity of TAV and other shareholders in the same relevant market as the JVC. Thus, the Board decided that the transaction may not cause any risk of coordination of competitive behavior.

In conclusion, the acquisition of the 33.34% shares of JVC by Goldman Sachs is approved by the Board.

[1] This provision is based on the "Old Merger Regulation", Council Regulation (EEC) n° 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJEC L 395, 30 December 1989, p. 1-12; OJEC L 257, 1990, p.13). However, this provision should be criticized since it regulates a merger case (joint ventures) which is not clearly provided in Article 7 of the Competition Act governing the merger control. Needless to say that, in accordance with the hierarchy of the legal norms, the Communiqué n° 1987/1 could not regulate a case which is not already regulated by the law.


[3] "In addition, the criteria of Article 81(1) and (3) of the Treaty should be applied to joint ventures performing, on a lasting
basis, all the functions of autonomous economic entities, to the extent that their creation has as its consequence an appreciable restriction of competition between undertakings that remain independent".