The Turkish competition board, while accepting the failing company defense, clears a merger conditional to remedies in the daily political newspapers market (Vatan Newspaper / Dogan Group)

Turkey, Mergers, Exclusive distribution, Remedies, Failing firm/industry defence, Press

The Turkish Competition Board (hereinafter referred to as the "CB") in its decision numbered 08-23/237-75, dated March 19, 2008 granted conditional authorization for the acquisition of the sole control of Bagımsız Gazeteciler Yayncılık A.S. and Kemer Yayıncılık ve Gazetecilik A.S. (hereinafter referred to as "Vatan Newspaper") by Dogan Gazetecilik A.S. (hereinafter referred as "Dogan Group") by taking into consideration the "failing company defense" alleged by the parties.

Relevant Market

The CB, by taking into consideration that Vatan Newspaper is published daily and dealt in whole country and that it contains pages about politics, economy, sport and magazine, stated that the relevant product market is "the national daily political newspapers market". As to the geographical market, the CB determined that it covers "the borders of the Turkish Republic" considering that the Vatan Newspaper is distributed in whole country as a uniform edition.

Determination of the Scope

The CB, in the view of the Communiqué on the Mergers and Acquisitions Calling for Authorization of the Competition Board n° 1997/1, asserted that the relevant transaction constitutes an acquisition calling for authorization [1].

Effect of the Acquisition on Dominant Position

Article 7/I of the Act on Protection of Competition numbered 4054 (hereinafter referred to as "Competition Act") prohibits acquisitions creating or strengthening dominant position and which, as a result, have a negative effect on the competition in the relevant market [2]. The CB settled that Dogan Group is in dominant position in the relevant market. The CB added that Vatan Newspaper has an established trademark and audience. It also underlined that after the acquisition, the market share and advertisement revenue of Dogan Group will increase notably. The CB determined that this fact may restrict the access of the potential competitors to the relevant market.

In the light of the abovementioned explanations, CB concluded that, in case of acquisition of Vatan Newspaper by Dogan Group, the latter will probably strengthen its dominant position in a manner to restrict the competition in the relevant market.

Failing Company Defense

The failing company defense constitutes an exception to the aforementioned prohibition of Article 7/I [3] and a...
merger/acquisition falling into the scope of this exception shall be approved even if the said merger/acquisition creates or strengthen dominant position of the assignee.

The conditions of acceptability of failing company defense are resumed by doctrine as follows: the failing company will be driven out of the market if the said merger/acquisition will not be realized;

there is no less restrictive for way of saving the failing company in the market;

it has to be proved that the economical difficulties confronted by the failing company exist for a significant period;

the restructuring of the failing company, for example by way of reduction of its activities or the retreat from certain regions, is not possible.

The CB stated that there is no alternative local or foreign purchaser other than Dogan Group willing to purchase Vatan Newspaper. The CB added that if the transaction is not approved, the trademark or royalty related to Vatan Newspaper would be driven out of the market and this gap will probably be filled by Dogan Group newspapers.

In addition to this, in case this transaction is not approved by the CB, a part of Vatan Newspaper readers will apparently prefer other products belonging to Dogan Group. In the light of the foregoing, the CB determined that, all conditions of the failing company defense are satisfied and stated that the “failing company defense” is existing in the present case.

Conditional Approval

The CB underlined that the trademark and the royalty are the essential properties of Vatan Newspaper. In addition, the CB noted that only transfer of the trademark and the royalty are enough, and that there is no need to transfer the whole undertaking. The CB approved the acquisition provided that; Dogan Group should transfer the trademark and the royalty of Vatan Newspaper to third persons other than Dogan Group or any other undertaking (existing or to be established) directly or indirectly controlled by itself, within two years following the date of the transfer and by clearing all of its debts and obligations.

Conclusion

This decision taken by the majority of votes is the second decision of the CB in 2008 which allows an acquisition with the particular condition to transfer the undertakings/its part to third person within a defined period of time. Considering the MGS and Nazar decisions parallel to Vatan Newspaper decision, it can be concluded that the CB has established a new condition that may be imposed while approving mergers and acquisitions.

[1] To consult the Communiqué on the Mergers and Acquisitions Calling for Authorization of the Competition Board, see the following link: http://www.rekabet.gov.tr/dosyalar/....

[2] Article 7/I of the Competition Act n° 4054 is as follows: "Merger of two or more undertakings, aimed at creating a dominant position or strengthening their dominant position, as a result of which, competition is significantly decreased in any market for goods or services within the whole or a part of the country, or acquisition, except acquisition by way of inheritance, by any undertaking or person, of another undertaking, either by acquisition of its assets or all or a part of its partnership shares, or of other means which confer it/him the power to hold a managerial right, is illegal and prohibited." To consult the Act, see the following link: http://www.rekabet.gov.tr/index.php/....

[3] This exception recognized for mergers and acquisitions calling for authorization, does not exist in Turkish legislation.
However, following the practice in EU and USA legislation, CB firstly used this “failing company defense” in its decision named Uzel Holding A.S dated 20.07.2000 and numbered 00-27/294-164. To consult the decision, see the following link: http://www.rekabet.gov.tr/dosyalar/....

[4] In this decision, the vice-president and two board members had dissenting opinions which supported that an unconditional authorization should have been granted.

[5] Decision of the CB named MGS Marmara G&#305;da Sanayi ve Ticaret A.S. dated 07.02.2008 and numbered 08-12/130-46. To consult the decision, see the following link: http://www.rekabet.gov.tr/dosyalar/....