The Turkish Competition Board authorizes a joint control acquisition in the sector of manufacture and sale of components and systems for automotive and motor vehicles (Mahle/Behr)

Turkey, Mergers, Joint control, Change of control, Dominant position, Relevant market, Automobile

Turkish Competition Board (Rekabet Kurulu), 29 September 2011, File n 11-50/1256-445, Behr/Mahle


The Competition Board (the “Board”) authorized, under Act No. 4054 on the Protection of Competition numbered 4054 (the “Competition Act”) and the Communiqué No: 2010/4 Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board (the “Merger Communiqué”), the acquisition of joint control over Behr GmbH & Co (“Behr”) by the main shareholders of Mahle GmbH (“Mahle”) and Behr.

Multiphase Transfer of Control

Mahle envisages taking control of Behr in the year 2013. The mentioned acquisition of control will be implemented in several phases.

First phase consists of acquiring a 19.9 % interest of Behr’s share capital by way of capital increase and participation of Mahle within Behr as a limited liability partner. This first phase was completed on 18.10.2010.

In the second phase, which was completed on 17 January 2011, the total participation in the share capital of Mahle in Behr was increased to % 36.85.

Third phase, which is voluntary, provides Mahle with an acquisition option, which accredits Mahle to additional shares that would enable them to own the majority shares in the amount of 50.1% in Behr. It is stated in the Notification Form that this option may be used after the date of 01.01.2013.

A mid–phase is planned before proceeding to the above referred third phase that provides Mahle to preserve 36.85% of its share percentage and to acquire additional rights, which enable them to have joint control over Behr.

Transaction Parties
**Mahle** is active world-wide in the development, manufacturing and sale of components and systems for automotive and motor vehicles. **Mahle** ranks among the top systems suppliers worldwide for piston systems, cylinder components, as well as valve train, air management, and liquid management systems.

**Mahle** is active in Turkey through its subsidiaries **Mahle Farpías Filtre Sistemleri** A.Åž., **Mahle Mopisan Konya** A.Åž. and **Mahle Mopisan İzmir** A.Åž.

**Behr** manufactures and supplies original equipment for passenger and commercial vehicles, in particular components and complete systems of motor cooling and air-conditioning in automotive industry. **Behr** is currently owned and controlled by the **Behr** family, who is the main owner. **Mahle** has a minority shareholding in **Behr**.

**Behr** has been operating its business activities in Turkey through **Kale Behr Otomotiv Sanayi ve Tic.** A.Åž.

**Relevant Market**

*Affected Market.* Taking into consideration the activities of transaction parties, the Board determined that there are two different affected markets: The horizontal affected market and the vertical affected market. The Board defined the horizontal affected market as "the oil heat exchangers market developed, produced or sold for highway applications". The Board evaluated the supply relations between the transaction parties and concluded that vertical affected market is "the oil filters, heat exchangers, thermostats, cabin air filters, oil-water heat exchangers produced by **Behr** are inputs of oil filter modules produced by **Mahle**.

**Relevant Geographical Market.** The Board determined the relevant geographical market as “Turkey” by taking into account the homogenous nature of the sales conditions of the products in affected markets.

**Evaluations Within the Scope of Merger Communiqué**

The Board stated that pursuant to Article 5/1 (b) of the Merger Communiqué, "the acquisition of direct or indirect control over all or part of one or more undertakings by one or more undertakings or by one or more persons, who currently control at least one undertaking, through the purchase of shares or assets, through a contract or through any other means " shall be considered a merger or acquisition transaction within the scope Article 7 of the Competition Act.

The subject matter of the notification is the acquisition of rights envisaged within the mid-phase, which provide **Mahle** to have joint control. In this stage, the joint control shall be established without any transfer of shares but through amendments of the agreements and by the employment of executives of **Mahle** for two key positions in **Behr**.

**First Two Phases.** The Board initially evaluated the first two phases before making any further evaluations as regards to the mid-phase in subject of the notification and asked for explanation on why the first two phases were not notified. In reply, it is alleged that these phases do not shift the control and thereby they are not subject to notification.

However, in the first stage **Mahle** had acquired the right to appoint two members to the Supervisory Board of **Behr**, who are authorized to appoint the executive directors, managing the company. These executive directors only apply for the approval of the Supervisory Board in a few very important decisions, which are in the ordinary course of the business.

Under these conditions the Board decided that the first two phases must be evaluated to find out if any change of control occurs at that stage.
The Supervisory Board consists of six (6) members and takes decisions with simple majority. There are three exceptions, which require qualified majority as affirmative votes of five members; which are (i) commencing activities in new fields, ceasing current commercial activities, making essential changes in the sales program, (ii) comprehensive cooperation between Mahle and Behr and (iii) making amendments to the list of activities requiring the Supervisory Board’s approval.

The Board stated that control over an undertaking may be absolutely provided by a single control group or may be jointly provided by several groups. The absolute control can be defined as “the ability of single control group for solely determining the strategic commercial decisions or creating deadlocks by their unilateral veto rights and preserve the rights of the minority shareholders for protecting their investment”.

On the other hand, the Board noted that the joint control arises when more than one group of shareholders have equal impact on the strategic commercial decisions and such decisions can only be concluded by consensus and/or any of the parties may create deadlocks on their own discretion. The Board also emphasized that the joint control may be established through (i) equality in voting rights and in appointments to decision making positions, (ii) the use of shares having veto rights, (iii) having decisive impact on strategic decisions by the parties sharing the control through different ways such as common action in voting.

When evaluating the item (i) herein above, the Board drew attention to the point that in cases where the relation between the parties are stipulated through agreements, the equal representation of each party in the management bodies of the undertaking should be included in the provisions of the agreement and there should not be any decisive voting practice.

Notwithstanding, in cases where the joint control is established through shares having veto rights, these veto rights should go beyond protecting the rights of minority shareholders [1]. Moreover, CB did not evaluate the following decisions as strategic commercial decisions but rather evaluated them as elements required for the protection of shareholders investment rights: (i) amendments in the subject matter of the undertaking, (ii) capital increases or decreases, (iii) sales of assets, (iv) transfer or liquidation of the undertakings [2].

The Board examined the first two phases of the transaction from the above explained view and concluded that Mahle’s right to appoint two Supervisory Board members and its indirect veto right on commencing activities in new fields, ceasing current commercial activities, making essential changes in the sales program cannot be considered as strategic decisions. Thereby, the Board stated that no change of control occurred in the first two phases.

The Mid-phase. The transaction parties agreed to amend the duties, which are subject to the approval of the Supervisory Board. Thus, in addition to previous veto rights, Mahle shall have a provisional veto right on appointment of executive directors. This provisional veto right shall cease when Mahle's share percentage in Behr exceeds 50% or in any event latest by 31 January 2013. The Board concluded that this new provisional veto right provides Mahle a joint control over the day to day management of the undertaking.

In addition, this mid-phase also covers the appointment of two ex-Mahle employees as the Behr's CFO and Human Resources Manager.

The CFO's responsibilities shall cover budget planning, financial and cash management. Moreover, CFO shall be responsible for the approval of several expenditures. The decision making body in relation to legal department and purchasing department shall also be the CFO.

Participation Agreement provides that the main managerial subjects, including the determination of company budget, investment, finance, turnover, expenditure and employment plans shall be decided by the unanimity of the all Executive
Directors.

Another issue that would provide joint control to Mahle shall be the appointment of the Human Resources Manager, who will be responsible from the development of Behr’s global employment policies.

In the light of the above determinations, as a result of mid-phase after the first two phases Mahle and Behr shall have joint control and this would change the sole control of Behr.

Compulsory Notification/Turnover. The global turnovers of the both transaction parties exceed five hundred million TL, and their turnovers in Turkey also exceed five million TL. Thereby, this transaction is subject to the authorization of the Board in order to be legally valid.

Creation or Strengthening of a Dominant Position

Article 7/I of the Competition Act prohibits acquisitions creating or strengthening dominant positions and which, as a result, restrict significantly the effective competition in the relevant market \[2\].

The only horizontally overlapping market is the oil heat exchangers developed, produced or sold for high way application. Moreover, there is no vertical overlap in the Turkish geographical market. Thus, taking into consideration the number of undertakings active in the relevant market and their market shares, the Board concluded that the transaction in subject does not create or strengthen a dominant position.

Conclusion

The Board unanimously decided to authorize the acquisition of joint control over Behr GmbH & Co ("Behr") by the main shareholders of Mahle GmbH ("Mahle") and Behr, which would not impede effective competition by strengthening of a dominant position.

This decision is significant from several aspects. First of all, this decision thoroughly discusses the concept of “joint control” and its application by also referring to EU Legislation. Moreover, the Board deals with the notions of “absolute control” and “joint control” in a comparative way and distinguishes between the two concepts.

Furthermore, the detailed examinations on the structure of the rights granted to Mahle in the scope of the mid-phase displays a good and concrete example of "change of control by other means" stipulated under Article 5/I(b) of the Merger Communiqué.

If we are to criticize the decision, we should state that the provisional nature of the veto right on appointment of executive directors granted to Mahle in the Mid-phase is not argued in the existence of the requirement of a “permanent change of control” under Article 5/I of the Merger Communiqué. It is stated that this provisional veto right shall end either upon the acquisition of majority shares or in any event, latest by 31.01.2013. Thus, the Boards should have discussed whether such a provisional right constitutes a permanent change of control under the Merger Communiqué or not.

[1] Board

Article 7/I of Competition Act No. 4054 is as follows:

**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...