

The Turkish Competition Board clears an acquisition in the special chemicals industry sector (Eliokem Holding/Goodyear Chemicals)

Turkey, Mergers, Ancillary restriction, Market definition, Heavy industry

Turkish Competition Board (Rekabet Kurulu), 12 February 2002, Littlejohn Fund II, L.P. and Eliokem Holding SAS/Goodyear Chemicals Europe, Decision n° 02-08/58-27

In its decision dated 12 February 2002, the Turkish Competition Board (Hereafter "CB") unconditionally cleared the acquisition by Eliokem Holding SAS (Hereafter "Eliokem"), under the control of Littlejohn Fund II, L.P. (Hereafter "Littlejohn"), of Goodyear Chemicals Europe (Hereafter "GCE").

The aim of the concentration for Littlejohn, was to undertake Goodyear Group producing special chemicals through the medium of Eliokem created for the purposes of this acquisition.

The relevant markets in the special chemicals industry

The GCE, who is the subject of this acquisition, produces and markets the special chemicals also the dyes, the synthetic gum, the plastic, the latex products used in various fields. The CB grouped these chemicals in three categories such as special resins, plastic modification polymers (PMP) and performance chemicals.

The GCE is having all of its production in France without any production unit in Turkiye, but the following chemicals are sold in the Turkish market by way of the exportations: the dyes resin, styrene, chemigum powder, the wingstay antioxidant, the poligum for the production of chewing gum, the Vinyl Pyridine and the other chemicals.

Taken into consideration the absence of the substitutability of demand or the substitutability of supply, the CB defined each of the products above cited as a separate relevant market.

The CB's findings and the dominant position

The CB ruled, at first hand, that the acquisition falls with in the scope of Communiqué no. 1997/1 on the Mergers and Acquisitions Calling for the Authorization of the Competition Board article 4 (2) which makes the approbation of the CB compulsory for the realization of the operation with its two stepped system. According to said article, the mergers and the acquisitions as a result of which total market share of the undertakings that carry out the merger or acquisition exceeds 25 % of the market share in the relevant market within the whole or a part of the territory, or even though it does not exceed this threshold, their total turnover exceeds TL twenty-five trillion, is compulsory for them to take the authorization of the Competition Board.

The CB, in the second hand, taken into consideration that the GCE and Eliokem do not have any common relevant market, argued that the acquisition may not cause or strengthen dominant position.

Reasoning of the CB concerning the Ancillary Restrictions

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As regards Turkish Competition Law, the non-competition clauses or agreements envisaged within or as accessories of the mergers and the acquisitions are defined as the ancillary restrictions agreed on between the parties to the concentration which limit their own freedom of action in the market.

These restrictions are examined and classified with the assistance of three conditions. At first, the restriction has to be considered 'directly related' to the operation, just like an element ancillary to the implementation of the concentration which subordinate in importance to the main object of the concentration. Secondly, the restriction must be considered "necessary" to the implementation of the concentration which means that in its absence the concentration could not be implemented or could only be implemented under more uncertain conditions, at higher cost, over an appreciably longer period or with considerably less probability of success. Thirdly, the restriction has to be reasonable and appropriate which means that it shouldn't exceed its objective and a reasonable term.

In the present case, the CB examined in detail the ancillary restrictions envisaged in the Share Transfer Agreement article 5 entitled "Commitments": i) Non-competition commitment of the buyer: The buyer Littlejohn declares and accepts not to produce, market and sell the "reserved products" itself or its affiliates or joint ventures, outside the Asia for 5 years,

ii) Non-competition commitment of the seller: The seller Goodyear Group undertakes not to sell the "bought products" itself or its affiliates or joint ventures for 10 years,

iii) Know-how obligation of seller: The seller Goodyear Group undertakes to secure that it and its affiliates, agents, advisors and representatives do not use the confidential information related to their know-how for their own or for third person's benefit's.

The CB underlines that within the mergers and the acquisitions containing also the transfer of business establishment, goodwill, know-how and other intellectual property elements, the ancillary restrictions may be provided in order that the operation may be realized as is due. The CB stated that the non-competition clauses secure the transfer of the assets to the buyer and the protection of the buyer from the competition of the seller. Indeed, the said protection permits the buyer to achieve consumers' loyalty and/or habits. The CB concluded that the non-competition clauses are considered as ancillary restrictions in proportion that they are obligatory, reasonable and objective.

Moreover, the CB reasoned that by this acquisition some activities of Goodyear Group are transferred to the Littlejohn. But the Goodyear Group continues to produce the "reserved products".

Therefore, the CB accepted in its decision that the non-competition clauses restricting Littlejohn and Goodyear Group envisaged in the 5.(i) ve 5(ii) are obligatory, reasonable and objective. In addition, CB concluded that the non-competition clause restricting Goodyear Group envisaged in the 5(iii) is also obligatory, reasonable and objective.

In conclusion, the acquisition of GCE by Eliokem 100% affiliate of Littlejohn is cleared by the CB.

This decision is a good example for the cases where CB allows longer term restrictions than its current practices. In the case law of CB, in line with Commission practice, non-competition restrictions are limited to two years where the transfer of the undertaking includes only goodwill and three years if the transfer of the undertaking includes the transfer of customer loyalty in the form of both good will and know-how.

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