

# Turkish Competition Board clears a major acquisition in the industrial, medical and special gases sector considering, inter alia, non-compete provisions to be ancillary restrictions (Linde Gaz/BOS)

**Turkey, Mergers, Ancillary restriction, Collective dominance, Heavy industry**

In its decision dated 11 July 2007, Turkish Competition Board ("CB") examined the acquisition by Linde Gaz A.S. ("Linde") affiliate of a worldwide company Linde A.G. of *Birlesik Oksijen Sanayi A.S* ("BOS") affiliate of KOÇ Group; upon the complaint of Air Liquide alleging that by this acquisition shall establish a duopoly and create barriers against entering into the relevant markets.

The relevant markets in the industrial, medical and special gases sector

BOS produces and markets the industrial, medical and special gases (in bulk, in-site [by pipelines] or in the tubes) such as oxygen, argon, hydrogen, helium. Linde is also active in the industrial gases sector. Linde produces the carbon dioxide; the gas decomposed from air, some medical gases and also imports some special gases.

In the determination of the relevant product market, the CB grouped these gases according to their distribution type (in bulk, in-site [by pipelines] or in the tubes), into twelve categories such as tonnage oxygen, tonnage argon, tonnage azoth, bulk oxygen, bulk argon, bulk azoth, tube oxygen, tube azoth, tube argon mixtures, retail helium and special gases.

The geographic relevant market is defined as the territory of Turkish Republic.

Evaluation on Thresholds

The CB ruled, at first hand, that the acquisition falls within the scope of Communiqué n° 1997/1 on the Mergers and Acquisitions ("Communiqué") Article 4 (2). The mentioned Article regulates that total market share of the undertakings which carry out the merger or acquisition exceeds 25 % of the market in the relevant product market within the whole or a part of the territory, or even though it does not exceed this rate, their total turnover exceeds TL twenty-five million, it is compulsory for them to take the authorization of the Competition Board.

Examination on Dominant Position

The CB, at second hand, taken into consideration that the parties in the acquisition are active in the same relevant market, examined whether the transaction creates or strengthens a dominant position in any of the relevant product markets.

While its examinations on the dominant position, the CB underlined that pursuant to Competition Law precedents, although market share is the most important criterion; there is not any certainty on what level of the market share creates dominant position. Thus, market share is considered as a preferential criterion. For example, an undertaking with 45%-50% market share may be considered having dominant position in the absence of competitors having the same or

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close market share. However, on the other hand, if there are other competitors, who have similar market shares; then it would not be possible for an undertaking to determine economic parameters in a market independently from its customers and competitors. Consequently, the CB has taken into consideration of the high market shares of the competitors and decided that Linde do not and even by this transaction will not have a dominant position in the relevant market.

#### Examination on Joint Dominant Position

The CB, at third hand, examined the possibility of the creation of a joint dominant position among the major undertakings in the relevant market such as Habas, Linde/BOS and Aligaz Messer as a result of this transaction.

The CB underlined some factors multiplying the risk:

1. Undertakings in the relevant market to previously take part in anticompetitive coordination in the same of different geographical markets is a factor increasing the coordination risk.
2. The fact that the undertakings have equal or comparable market shares, is considered as a factor simplifying the coordination of the competitive behaviors.
3. Undertakings to be active in several markets (in the same product market but in several geographical markets or in the same geographical market but in different product markets). The CB underlined that as a result of the contacts in several markets, the undertakings may have more information regarding their competitors and more opportunities to punish their competitors violating the coordination.
4. The presence of structural connections of the undertakings.
5. The number of competitors in the relevant market.
6. The demand structure in the relevant market.
7. The characteristics of the relevant market.

As a result of its investigations, the CB declared that,

Although Habas, Linde/BOS and Aligaz Messer are active in several product markets in the same geographical market (3),

Their market shares are not similar (2)

There is no information regarding the coordinated behaviors amongst them in the relevant market (1).

The structure of the market (7) and the demand on the market being separated among strong buyers (6) is considered as an element reducing the coordination and the joint dominance risk.

In addition, the CB underlines the absence of structural connections among the undertakings (4) and the high number of undertakings (5) in the relevant market.

In the light of the foregoing, the CB concludes that, in the near future, the risk of coordination among the undertakings in the relevant market is very low.

## Reasoning of the CB concerning the Ancillary Restrictions

In the present case, the CB examined the details of the ancillary restrictions envisaged in the Share Transfer Agreement article 8.7:

Non-competition commitment of the seller for the industrial, medical and special gases market for a term of 2 years

Confidentiality commitment of the seller for a term of 5 years regarding the information related to the said transaction, the transferred know-how, the product development.

The CB stated that the non-competition clauses, securing the transfer of the assets to the buyer and the protection of the buyer from the competition of the seller, may be approved under some conditions: The CB concluded that the non-competition clauses are considered as ancillary restrictions in proportion that they are obligatory, reasonable and objective. Therefore, the CB accepted in its decision that the non-competition clauses obligating Koç Group envisaged in the Agreement is obligatory, reasonable and objective.

We must note that CB looks into the proportionality principle in many of its decisions regarding non-competition clauses. In parallel to the above evaluation, CB's viewpoint is that non-competition clauses can only be considered within the concept of ancillary restraints as long as, they are directly related to the acquisition and proportional in its contents and time frame [1].

This decision is in line with CB's precedents on non-competition restrictions, where non-competition restrictions are limited to two years in case of 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.

While its examination of the confidentiality clause, the CB stated that the first thing to be done is to check whether the confidentiality clause shall be considered as a non-competition clause or not:

In this subject, the CB stated two criteria:

non disclosure clauses

clauses restricting the disposition of the information regarding the work subject to transaction - clauses restricting the disposition of the information regarding the parties in the transaction

The CB added that clauses restricting the disposition of the information, especially for the information regarding the parties in the transaction can be considered anticompetitive (or as a barrier to entry) and shall be analyzed as ancillary restrictions.

Therefore, the CB declared the confidentiality clause envisaged in the Agreement reasonable due to the fact that the clause concerns the non disclosure of the information relating to the transaction and limited to a 5 years period.

In conclusion, the acquisition of BOS by Linde affiliate of Linde AG is unconditionally cleared by the CB.

[1] See *Danonesa/Tikvesli* decision, dated 30 December 2003, Case n° 03-84/1021-409, *Bobst Group SA/Metse Paper Inc.* decision, 30 December 2003, Case n° 03-84/1020-408.

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