

e-Competitions

Antitrust Case Laws e-Bulletin

April 2019 - II

The Ankara 9th Administrative Court puts a break on a port acquisition after Competition Board's conditional clearance with behavioural remedies (*Kumport*)

MERGERS, COLLECTIVE DOMINANCE, BEHAVIOURAL REMEDIES, PRIVATE ENFORCEMENT, REMEDIES (MERGERS), TURKEY, COORDINATED EFFECTS, MERGER (NOTION), EFFECT ON COMPETITION, TRANSPORT (SEA)

Ankara 9th Administrative Court, Kumport Liman Hizmetleri Lojistik / Turkish Competition Authority, No. 2018/2277 E, 28 March 2019

Gönenç Gürkaynak | ELIG Gürkaynak Attorneys-at-Law (Istanbul)

Burcu Can | ELIG Gürkaynak Attorneys-at-Law (Istanbul)

e-Competitions News Issue April 2019 - II

Background

Limar Liman ve Gemi İşletmeleri A.Ş. ("**Limar**"), which is controlled by Arkas Holding A.Ş. ("**Arkas**") notified to the Turkish Competition Authority (the "**Authority**") its acquisition of the sole control over Mardaş Marmara Deniz İşletmeciliği A.Ş. ("**Mardaş**" or the "**Target**") operating the Ambarlı Port on February 14, 2017 ("**Transaction**"). Prior to the transaction, Mardaş had been jointly controlled by Atak Holding A.Ş. ("**Atak**") and Asmar Holding A.Ş. ("**Asmar**").

In its initial assessment, the Turkish Competition Board (the "**Board**") had competitive concerns related to both (i) horizontal effects, in particular potential collective dominance of MSC and Arkas in container handling, and (ii) vertical effects, as the transaction could potentially lead to input foreclosure in the market for shipping line operation due to the current business ties between port operators in the upstream market. The Board therefore opened a Phase II investigation, where the Board found the behavioural commitments offered by the parties sufficient to eliminate these concerns and conditionally cleared the transaction on May 8, 2018 (decision no 18-14/267-12) (the "**Board's Decision**").

Kumport Liman Hizmetleri Lojistik San. ve Tic. A.Ş. ("**Kumport**") filed a lawsuit before the Ankara 9th Administrative Court (the "**Court**"), a court of first instance for administrative law cases, against the Board's decision and requested a stay of execution order together with annulment of the Board's decision. The Court ordered a stay of execution on December 19, 2018; and the Authority appealed the decision to the Ankara Regional Administrative Court's 8th Administrative Trial Chamber (the "**Regional Court**").

The Regional Court revoked the stay of execution on February 13, 2019 on procedural grounds. In its reassessment, the Court reiterated its position against the Board's decision and ordered a stay of execution once again on March 29, 2019. A stay of execution is an interim decision and the Court's final decision on Kumport's request for annulment is still pending.

The Board's Decision

The Transaction notified to the Authority concerns acquisition of Mardaş by Limak, which is controlled by Arkas. The Board identified the affected markets as the markets for (i) port management services for container handling, (ii) temporary storage with customs, (iii) pilotage and towage services, and (iv) ancillary services at the Ambarlı Port. The Board's competitive concerns were related to the first affected market only.

The focal point of the Board's competitive analysis was the business ties between the transaction parties and other competitors in the affected markets. For instance, despite of Limak being not active in port management services for container handling or the other affected markets, the Board found it relevant to its assessment that Marport Liman İşletmeleri Ticaret ve Sanayi A.Ş. ("**Marport**"), a joint venture of the acquirer (Arkas) was active in all four affected markets. Further, Arkas was active in the upstream markets of port management services, i.e., ship brokerage and container transportation. The other parent of Marport, Mediterranean Shipping Company ("**MSC**"), operated in Asyaport, another port located in sub-northeast Marmara region and provided port management services for container handling market. In light of the above, the Board found that post-Transaction, Marport and its shareholders would control three of the four container terminals active in the port management services for container handling market in the same region.

These business relationships between the transaction parties and another market player raised concerns regarding potential coordination effects given that MSC was already active in port management services for container handling and Arkas would also be active the same market post-Transaction. Moreover, Arkas's operations through its joint venture Marport would horizontally overlap with the Target's activities and the other parent of this joint venture would start operating in the same relevant product market. Post-Transaction, the combined market share of Arkas and MSC would exceed 80%. The Board therefore ultimately concluded that the Transaction would result in collective dominance of Arkas and MSC in this market.

The Board also analysed potential vertical effects of the transaction. Arkas was a vertically integrated entity active in both container terminal management and container ship line services. Even though the market shares of Arkas in the upstream market and the Target in the downstream market did not exceed the threshold of a potential dominance, i.e. 40%, the Board found that the Transaction could still result in input foreclosure. The Board argued that all of the ports in the region except Kumport were operated through Arkas group and its business partners; and thus Arkas's competitors in the downstream container transportation market could potentially suffer from discriminative practices.

In order to eliminate the Board's concerns, the parties offered only behavioural remedies, which can be summarized as follows:

- Marport and Marpaş would be separated in operational and legal terms: executives and other employees (such as accounting and legal departments) of these two companies, their headquarters and equipment such as crane and vehicles would be different;
- Marport and Mardaş would not establish a mechanism enabling exchange of commercially sensitive

information to which their competitors have no access;

- Marport and Mardaş would have sufficient resources to operate and render their strategic decisions independently;
- Commercial conditions applied to Mardaş's current customers in the container transportation market would not change in the first 36 months post-Transaction;
- Operational conditions (e.g. ship berthing, field capacity) applied to the current customers of Mardaş in container transportation market would stay in place;
- Arkas, through Mardaş would provide services under objective commercial conditions and without discrimination to its container transporter customers, and would allocate 30% of its ship berthing and field capacity to its current and potential customers. Arkas would not discriminate against its competitors or competitors of its partners; and would not apply higher prices to any container transporter with the same load volume as Arkas.
- Standard Port Services Price list of Mardaş would not be revised in the first 12 months following the Transaction. Thereafter, the prices would be set competitively and the parties would not set excessive prices. Arkas would also submit information on the price lists if requested by the Authority.

The Board found these commitments sufficient and underlined that the third remedy above also eliminated the concerns regarding implementation of the commitments. The Board ultimately granted conditional approval to the Transaction.

The Court's decision [1]

Following the Board's conditional clearance, Kumport, the only port in the relevant geographic markets that Arkas does not control, brought a legal action against the Board's decision before the 9th Administrative Court in Ankara and requested a stay of execution order in addition to the annulment of the Board's decision.

The Court first analysed whether behavioural remedies were sufficient to eliminate competitive concerns. In its assessment the Court cited Paragraph 19 of the Guidelines on Remedies that are Acceptable by the Turkish Competition Authority in Merger/Acquisition Transactions (the "**Guidelines**"), providing that behavioural remedies were exceptional and can only be accepted when they "*are capable of achieving a level of efficiency similar to structural remedies in eliminating competition problems and in cases where an equally effective structural remedy is not available*".

Pursuant to the Guidelines, the Court held that the Board's analysis fell short of explaining how the remedies offered by the parties could eliminate competitive concerns, these remedies were in fact not capable of eliminating competitive concerns and there was no effective implementation and supervision system was in place. The Court therefore ordered a stay of execution stating that "*implementing this decision, which is clearly unlawful, could result in irreversible damages*".

Regional Court's decision [2]

The Authority objected to the Court's decision before the Regional Court. The Regional Court found that, during the Court's review of the stay of execution request, Arkas submitted a petition to the Authority stating that the parties cancelled the Transaction that was already approved by the Board, because since they could not agree on the commercial conditions to be applied to Transaction. The Regional Court further held that the Court should have taken into account this petition and investigate whether this petition was still valid. The Regional Court therefore annulled the Court's stay of execution order.

Reassessment of the Court [3]

Following the reversal decision of the Regional Court, the Court once again ordered a stay of execution on March 28, 2019, without providing any analysis on whether or not the Court investigated whether the petition of the parties were still valid, and if not, on what grounds. The Court's final decision on the request for an annulment is still pending.

Conclusion

The Limar/Mardaş merger is already quite exceptional as there are only a handful of cases in Turkey where the "collective dominance" theory has come into play in a Board decision. In addition to this, another exceptional decision in this case came from the court of first instance staying the execution of the Board's conditional clearance. In more than 20 years of competition law practice in Turkey, there has not been a single merger case where the courts challenged a clearance decision on substantive grounds.

On top of all, the Court's decision on this merger has aggravated the concerns on whether a remedy package comprising only behavioural remedies can succeed in merger cases, which have already been seldom accepted by the Board. In practice, almost all conditional clearances are based on structural remedies alone or a combination of structural and behavioural remedies.

The Court's stay of execution order is an interim decision and thus the parties may still salvage the transaction in the final decision. That said, stay of execution orders in competition law cases are not very common, and usually taken as a signal that the Court has serious concerns on whether the Board decision at hand complies with the law.

In light of the foregoing, the Court's final decision on the case will, no doubt, set a milestone in Turkish competition law regardless of whether it will be in favour or against the transaction parties.

[1] Decision of December 19, 2018 No. 2018/2277

[2] Decision of February 13, 2019, Objection No.2019/87

[3] Decision of March 28, 2019; no. 2018/2277 E.