

Recent competition law developments in Turkey: the administrative court's stay of execution decision regarding behavioral remedies

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The stay of execution order of the ninth administrative court of Ankara (court) regarding the Turkish competition board's conditional approval decision dated 8 May 2018 and numbered 18-14/267-129 sheds some light and provides insights for future cases regarding the court's approach towards behavioral remedies. The court found that the behavioral remedies accepted by the board were not adequate to address the competition concerns and that implementation of such unlawful act would result in irrevocable damages.

The board's decision is related to the acquisition of all shares of Mardaş Marmara Deniz İşletmeciliği (Mardaş) by Limar Liman ve Gemi İşletmeleri (Limar) (through its wholly owned subsidiary Arter Terminal İşletmeleri (Arter)), which is ultimately controlled by Arkas Group.

In its decision, before delving into the relevant product and geographic market definition, the board first examined the Mardaş's and Limar's activities. In this respect, the Board observed that Mardaş, which is the target, is active in container handling services, temporary storage (duty-paid) services, guidance and towage services (through its shares in Ambarlı Römorkaj Pilotaj Ticaret (Arpaş)) and supportive services (through its shares in Ambarlı Liman Tesisleri Tic (Altaş)) at Ambarlı Port located in Istanbul. On the other hand, the board noticed that Limar, which is the the acquiring party, provides port services at several ports such as Izmir, Borusan, Limaş, Mersin MIP, Haydarpaşa, DP World Yarımca and Iskenderun Limak. Further, the board noted that

Limar's activities in the Ambarlı region have been carried out under the auspices of Marport Liman İşletmeleri Sanayi ve Ticaret (Marport) which is a joint venture controlled by Arkas Group and MSC Gemi Acenteliği Anonim Şirketi (MSC).

In its assessment, the board took into account the activities of Mardaş as well as Arkas Group and defined the relevant product markets as 'terminal services for container handling concerning hinterland traffic', 'terminal services for container handling for transit traffic', 'temporary storage (duty-paid) services', 'guidance and towage services' and 'supportive services of Ambarlı Port'. Moreover, the board also evaluated 'container shipping line operations services' and 'vessel agency services' of Arkas Group with regards to vertical effects of the transaction. Thereafter, the board provided geographical market definitions for each of the relevant product markets. In this respect, the board defined the relevant geographic markets as (i) 'Marmara Region' (and the Northwest Marmara region as a sub-market) for container handling services, and (ii) 'Ambarlı Port' for temporary storage (duty-paid) services, guidance and towage services and support services to the Ambarlı Port markets. The board noted that although the geographic scope of the market for terminal services for container handling for transit traffic could be deemed as Turkey and the neighboring countries, it would leave the precise geographical scope open for this product market.

With regards to horizontal overlaps between the parties' activities, the board found that

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competitive concerns arose particularly with regards to container handling services market¹ in the Northwest Marmara sub-region, Marport's (controlled by Arkas Group and MSC) market share was 53.3%, and Mardaş' market share was 8.2% in 2016 whereas in the Marmara region, Marport's market share was 34.1% and Mardaş' market share was 5.2%. In this regard, the board found that (i) the level of concentration in the container handling services market, (ii) the existence of strong competitors and (iii) the expected capacity increases in the nearby ports (along with new entrants), meant that no single undertaking could hold a dominant position in the market. That being said, the board noted that the transaction could lead to creation of collective dominance bearing in mind that (i) Arkas Group's partner in Marport, MSC, was also active in the Northwest Marmara sub-region through Asyaport (Tekirdağ), and (ii) three of the four ports in the Northwest Marmara sub-region would be controlled by shareholders of Marport (their collective market share reaching 81.2% in the Northwest Marmara sub-region and 51.9% in the Marmara region).

In the assessment of the dominance, the board also took into consideration (i) entry barriers (due to unused capacity), (ii) MSC and Arkas Group being competitors in container transportation market and MSC's agreement with Maersk within the 2M Alliance, and (iii) post-transaction co-ordination risks in its assessment. It found that these would contribute to the incentives to

co-ordinate behaviors in the market and, therefore, lead to a collectively dominant position by MSC and Arkas Group.

As for the vertical relationships, the board found that the transaction could lead to input foreclosure in container shipping (due to cross-shareholdings among undertakings). Particularly, the board noted that the Mardaş port and the alternative ports (other than Kumport) would be controlled by Arkas Group (and its business partners) and access to these ports would be potentially restricted if Arkas Group decided to engage in discrimination against competing container shipping line operators.

In order to address the board's concerns, the parties submitted a remedy package comprised of behavioural remedies targeting both horizontal and vertical concerns. With respect to horizontal competition concerns in the container handling services market, the parties first undertook to dissociate the corporate bodies of Marport and Mardaş. This meant operational and legal dissociation, such as (i) operating under the direction of different governing bodies, board of directors, general managers etc; (ii) operating from different facilities; (iii) not sharing confidential and sensitive information with each other (and also taking additional measures to restrict information flow and introducing independent audit firms for inspection of the information flow); (iv) ensuring adequate resources for independent activities; (v) employing different personnel in the accounting and legal departments

and (vi) operating with different tools (such as vehicles, cranes etc).

Additionally, with respect to the vertical competition concerns in the downstream container shipping line operations and the upstream container handling markets, Arkas Group undertook several remedies involving (i) not changing the commercial terms, operations and certain services offered to current feeder and/or deep sea liner customers of Mardaş for 36 months from the date of the share purchase agreement, (ii) not amending Mardaş's 2017 standard port services tariff for 12 months from the date of the share purchase agreement, and (iii) following this 12 month period, determining new tariffs in light of competition in the market and avoid excessive pricing and, upon request, informing the competition authority of these prices every six months. Moreover, the parties proposed to provide services to Arkas Group and its business partners' services on non-discriminatory and objective commercial terms. In order to address the risk of co-ordination, the parties assumed to set up mechanisms for the sake of data security of Arkas Group and Mardaş.

Subsequent to the board's decision, Kumport (a port also operating in Northwest Marmara) filed an administrative lawsuit against the board through which the suspension of the board's decision was also requested due to the likelihood of irrecoverable damages from the transactions.

The court emphasised that proposed

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remedies were required to eliminate all competitive concerns in accordance with Article 14 of Communiqué 2010/4 on mergers and acquisitions that required the approval of the board. As per paragraphs 18 and 19 of the competition authority's guidelines on acceptable remedies in M&A transactions, the court considered that the behavioral remedies may only be approved in cases that 'behavioural remedies are capable of attaining a level of efficiency similar to that of structural remedies in eliminating competition problems and in cases where an equally effective structural remedy cannot be found'. In light of this consideration, noting that all of the remedies proposed by the parties were behavioural in essence, the court found that (i) the proposed behavioural remedies would not eliminate competitive concerns, (ii) no effective implementation and monitoring mechanism was adopted with respect to the remedy package, and (iii) the board failed to provide adequate reasoning on how these remedies would address concerns on the creation/strengthening of dominant position and co-ordination effects stemming from the transaction.

Accordingly, the Court's stay of execution decision has been appealed before the eighth administrative chamber of Ankara regional administrative court (regional court). The regional court noted that, prior to the date of the court's stay of execution order, Limar submitted a statement declaring that the parties decided to call off the transaction due to a disagreement on commercial conditions. In this regard, the regional court held that

the court should have established whether (i) the board has taken a new decision upon being informed of the discontinuation, and (ii) the prior approval decision on the acquisition of Mardaş was still valid. The regional court, therefore, annulled the court's decision and referred the file back for a new decision to the court.² Upon annulment by the regional court, the court insisted on its decision and again ordered a stay of execution with the same reasoning and did not refer to any of the issues raised in the regional court's decision.³

As the parties decided to call off the transaction, the court's first decision on behavioural remedies has been reversed, however the court nevertheless insisted on its decision. Even though there are certain precedents of the board granting approval to transactions with behavioral remedies, such as *Bakaert/Pirelli* [2015], *Turkish Privatization Administration - Toros Tarım Sanayi ve Ticaret AŞ* [2008], *Migros/AEH* [2015] and *THY/Usaş*, [2006], as also provided under the authority's guidelines, it is not an uncommon approach to give precedence to structural remedies over behavioral ones, as behavioral remedies may be regarded insufficient in terms of eliminating the competition law concerns arising from the transaction. In this respect, this decision exemplifies that, even if the sole submission of behavioural remedies is accepted and found sufficient by the board, the administrative courts may still be inclined to rule that the proposed behavioural remedies would not eliminate competitive concerns brought about by the respective transaction. As such, the Court's assessment of the remedy package in both the reversed and the latter stay of

execution decisions sheds some light and provides insights for future cases. We are yet to see how the board's assessment of behavioural remedies would be affected by this decision. ■

Notes

- 1) The board found that the concentration level in the temporary storage (duty-paid) services market did not create or strengthen a dominant position while also noting that the transaction would not lead to any competition concerns in the (i) guidance and towage services and (ii) supportive services of Ambarlı Port markets.
- 2) The eighth administrative chamber of Ankara regional administrative court decision dated February 13, 2019, and numbered 2019/87.
- 3) The Ankara ninth administrative court's decision dated March 28, 2019, and numbered 2018/2277 E.

Bakaert/Pirelli

[2015] 15-04/52-25

Turkish Privatization Administration -

Toros Tarım Sanayi ve Ticaret AŞ

[2008] 08-16/189-62

Migros/AEH

[2015] 15-29/420-117

THY/Usaş

[2006] 06-96/1225-370