It's a Merger... It's a Joint Venture... The Turkish Competition Board Revisits the Analysis Regarding the Nature of Concord/Niche-Slim Fusina Transaction

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(1) Introduction

In March 2022, the Turkish Competition Board ("***Board***") unconditionally approved the transaction concerning the merger between Slim Fusina Rolling S.R.L. ("***Slim Fusina***") and Niche Fusina Rolled Products S.R.L. ("***NFRP***") (the "***Approval Decision***").[1] In the Approval Decision, the Board evaluated that all assets related to Slim Fusina would be transferred to NFRP; Slim Fusina would cease its business operations and cease to exist as a legal entity; and the combined entity would continue its activities under NFRP. In this respect, considering that Slim Fusina and NFRP would be merged under NFRP, the management would be conducted by NFRP and the combined entity would continue its activities under a single legal entity, the Board identified that the relevant transaction constituted a merger rather than an acquisition, despite the fact that NFRP would continue to be ultimately jointly controlled by Concord Resources Limited ("***CRHL***") and Niche European Holdings LLC ("***Niche***") following the transaction. Consequently, the Board unconditionally cleared the transaction as it did not result in any competition law concerns in Turkey. However, what seemed to be an uneventful case involving a non-problematic straightforward transaction later turned into a more complex file due to CRHL's request that the Turkish Competition Authority (the "***Authority***") reassesses its analysis concerning the nature/characteristic of the transaction and identifies the transaction as an acquisition of joint control instead of a merger. Upon this request, the Board re-evaluated the nature of the transaction and resolved that there is no need to remove, withdraw or amend the Approval Decision, thereby sticking with its original conclusion that the transaction indeed qualifies as a merger (the "***Reassessment Decision***").[2]

(2) CRHL's Request in relation to the Analysis in the Approval Decision

[1] The Board's decision dated 17.03.2022 and numbered 22-13/205-88.
[2] The Board's decision dated 27.10.2022 and numbered 22-49/722-302.

Within the scope of its request, CRHL indicated that (i) the parties to the transaction defined the relevant transaction as the acquisition of joint control over the business unit under Slim Fusina by CRHL and Niche, (ii) it was explained in the merger control filing submitted before the Authority that the transaction would be realized through NFRP, which is a special purpose vehicle jointly controlled by CRHL and Niche, (iii) NFRP was established merely for realizing the relevant transaction, it did not generate any turnover and conduct any business activities in previous years. In this respect, CRHL argued that (i) NFRP should not be considered as an undertaking concerned or a party to the transaction given that it is merely a special purpose vehicle established for the purposes of the transaction, (ii) CRHL and Niche should be considered as undertakings concerned as the parent companies of NFRP, (iii) CRHL and Niche acquired joint control over Slim Fusina through NFRP, (iv) however, the Board identified NFRP as an undertaking concerned and defined the transaction as a merger between Slim Fusina and NFRP. As a result, CRHL requested the Board to revisit its assessment and evaluate the transaction as an acquisition of joint control over Slim Fusina by CRHL and Niche, rather than a merger.

(3) Concepts of "Merger" and "Acquisition" under Turkish Merger Control Regime

According to paragraphs 5 and 6 of the Authority's Guidelines on Cases Considered as a Merger or Acquisition and the Concept of Control ("***Control Guidelines***") which are closely modelled to paragraphs 9 and 10 of the European Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 ("***CJN***"), under Turkish merger control regime a merger occurs in one of these instances: (i) two or more independent undertakings amalgamate into a new undertaking by terminating their legal entities, or (ii) an undertaking is merged into another undertaking entirely, with one of the undertakings survive as an entity, or (iii) where the combining of the activities of previously independent undertakings results in the creation of a single economic unit, although the undertakings do not amalgamate into a single legal entity. On the other hand, 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 are considered an acquisition. Article 5(1)(a) of Communiqué 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("***Communiqué No. 2010/4***"), which provides the definition of merger, is akin to Article 3(1)(a) of the EC

Merger Regulation ("***ECMR***"), and Article 5(1)(b), which provides the definition of an acquisition, is akin to Article 3(1)(b) of the ECMR.

In line with the definitions provided above, by way of an example, if a merged/combined entity would not be controlled by any person or entity after the consummation of the transaction, the transaction would be considered as a merger for the purposes of the Turkish merger control regime. On the other hand, by way of another example, if an entity would be ultimately jointly controlled by its shareholders following the transaction, such transaction would not constitute a merger under Turkish merger control regime (i.e. it would be deemed as an acquisition of joint control transaction rather than a merger). Accordingly, if the surviving entity's shareholders would exercise control over the combined entity after the consummation of the transaction, such transaction would concern the acquisition of joint control over the surviving entity ultimately by its shareholders. That being said, if the combined entity would not be controlled by any of the surviving entity's shareholders after the consummation of the transaction, the undertaking that would cease to exist will in fact be merged into the other undertaking which will survive as an entity. In that case, such transaction would be considered as a merger for the purposes of the Turkish merger control regime.

(4) Identification of "Undertakings Concerned" and "Transaction Parties" under Turkish Merger Control Regime

Article 4 of Communiqué No. 2010/4 and paragraph 5 of the Authority's Guidelines on Undertakings Concerned, Turnover And Ancillary Restraints In Mergers And Acquisitions (the "***Turnover Guidelines***") define "undertaking concerned" as the person or economic unit that is directly a party to a merger or an acquisition; and "transaction party" as the economic entity/group in which "undertaking concerned" is included. Similar to paragraph 146 of CJN, paragraph 17 of the Turnover Guidelines provides that in case an acquisition is realized by a full-function joint venture already operating in the market, the "undertakings concerned" are the full-function joint venture itself and the target to be acquired, whereas each of the joint venture's controlling parents is a "transaction party". On the other hand, as per paragraph 18 of the Turnover Guidelines which is similar to paragraph 147 of CJN, where the joint venture can be regarded as a mere vehicle for an acquisition by the parent companies, each of the parent companies will be considered as "undertakings concerned", rather than the joint venture itself.

According to the relevant paragraph, this is the case in particular where the joint venture is set up especially for the purpose of acquiring the target company or has not yet started to operate, or where an existing joint venture has no full-function character. The Board's approach in determining the undertakings concerned and the transaction parties for the purposes of its merger control review is generally akin to the European Commission's (the "***Commission***") approach. By way of an example in conjunction with the concepts of "merger" and "acquisition", in case the surviving entity's shareholders would exercise control over the combined entity after the consummation of the transaction (i.e. if the transaction would be deemed as an acquisition of joint control over the surviving entity ultimately by its shareholders), even under the assumption that the surviving entity is a full-function joint venture and therefore it would be the undertaking concerned according to paragraph 17 of the Turnover Guidelines, its shareholders would be considered as the transaction parties.

(5) The Board's Reassessment regarding the Nature of the Transaction and the Identity of the Undertakings Concerned

Within the scope of the Reassessment Decision, the Board discussed whether the transaction constituted a merger or an acquisition. First of all, the Board underlined that all assets, legal affairs and obligations related to Slim Fusina would be transferred to NFRP; Slim Fusina would cease its business operations and cease to exist as a legal entity after the consummation of the transaction; and Slim Fusina would be dissolved as a result of the bankruptcy process that was ongoing at the time of the transaction. In addition, the Board remarked that (i) Slim Fusina and NFRP would be merged under NFRP, (ii) the management of the combined entity would be conducted by NFRP, and (iii) the combined entity would continue its operations under a single legal entity. Against the foregoing, the Board concluded that the transaction constituted a merger on the basis of paragraph 5 of the Control Guidelines which provides that "*a merger may also occur when an undertaking is absorbed by another, the latter retaining its egal identity while the former ceases to exist as a legal entity*".

Secondly, the Board referred to the merger control filing submitted before the Authority regarding the transaction which explained that NFRP will be a full-function joint venture after the transaction. In this respect, the Board considered that (i) NFRP is not a mere vehicle established solely for the purposes of realizing the transaction, (ii) NFRP will start operating in

the market after transferring Slim Fusina's assets, and (iii) NFRP should be identified as an undertaking concerned given that it will be a full-function joint venture post-transaction. The Board also found that the objections in CRHL's request arguing that NFRP should not be identified as an undertaking concerned as per paragraph 18 of the Turnover Guidelines given that it is merely a special purpose vehicle are inadmissible, on the grounds that such objections are inconsistent with the information provided in the merger control filing explaining that NFRP will be a full-function joint venture. As a result, the Board decided that the relevant transaction cannot be regarded as an acquisition of joint control over Slim Fusina by CRHL and Niche; and therefore, there is no need to amend the Board's Approval Decision.

The Board's approach in the Approval Decision and the Reassessment Decision concerning the determination of undertakings concerned and the nature of the transaction might be interpreted as differing from the Board's assessment in other recent cases. For instance, in the Reassessment Decision, despite the fact that CRHL underlined that NFRP is a special purpose vehicle established solely for the purposes of the relevant transaction, NFRP did not generate any turnover and conduct any activities in the previous two years preceding the Approval Decision, and NFRP will continue to be ultimately jointly controlled by CRHL and Niche, the Board insisted that (i) NFRP will become a full-function joint venture after transferring Slim Fusina's assets, (ii) therefore NFRP should be identified as an undertaking concerned, (iii) and the transaction should de defined as a merger between NFRP and Slim Fusina instead of an acquisition. On the other hand, in a similar type of transaction where the parent companies (i.e. Stellantis N.V. ("***Stellantis***") and BNP Paribas S.A. ("***BNPP***")) acquired joint control over a target through a full-function joint venture (i.e. Opel Bank S.A ("***OVF***")), the Board evaluated on the basis of paragraph 18 of the Turnover Guidelines that Stellantis and BNPP are the real players behind the operation, therefore Stellantis and BNPP should be considered as undertakings concerned despite the fact that OVF, a full-function joint venture that is active in the market, were acquiring the target and deemed the transaction as an acquisition of joint control by Stellantis and BNPP.[3]

(6) Conclusion

[3] The Board's decision dated 07.07.2022 and numbered 22-32/497-199.

Concepts such as “merger”, “acquisition”, “undertaking concerned” and “transaction party” are fundamental aspects of every merger control regime and it is not very often that competition authorities delve into detailed discussions on these subjects in their merger reviews. The Board’s Reassessment Decision is one of these rather rare and unique cases which sheds further light on highly essential questions concerning merger control matters such as “what constitutes a merger”, “which measures are applied to distinguish between a merger and an acquisition”, “under which circumstances a party to the transaction would be deemed as an undertaking concerned”, and “what is the role of full-functionality criteria in identifying undertakings concerned”. While it remains to be seen whether the Reassessment Decision will be a reference point for answering such questions, this case does not fail to demonstrate that even the very basic aspects of merger control review can become highly controversial subject matters.

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