

**Examination of Non-Compete Obligations in the Articles of Association of a
Joint Venture under Competition Law and Commercial Law – An
Overview in Light of the Turkish Competition Board’s WKS Istanbul
Decision of 8 February 2018**

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A. Introduction

The Turkish Competition Board (the “**Board**”) has recently published its reasoned decision¹ with respect to its *ex officio* preliminary investigation on (i) the validity of the non-compete obligation in the articles of association (“**AoA**”) of a joint venture company, namely WKS Istanbul Tekstil Kalite Kontrol Hiz. Ltd. Şti. (“**WKS Istanbul**”), which is active in quality control of textiles and (ii) the parties’ request for negative clearance of the relevant non-compete obligation.

The preliminary investigation concerned the joint venture as well as the parent companies, namely Enco İstanbul Seyahat ve Taş. Tic. Ltd. Şti. (“**Enco**”) which provides international road, rail and sea transportation, warehousing, local complete/partial distribution and customs clearance services; Meyer&Meyer Vermaltungs Und Beteiligungsgesellschaft Mbh (“**Meyer&Meyer**”) which provides services regarding quality control, fix and process, warehousing and transport of fabrics; and WKS Textilveredlungs GmbH (“**WKS GmbH**”) which is active in processing and trading services of textiles.

B. The Board’s Evaluation on the Case at Hand

Article 12 of WKS Istanbul’s AoA titled “*prohibition of competition*” contains two distinct non-compete obligations:

¹ The Board’s decision dated February 8, 2018 and numbered 18-04/58-32.

Firstly, it prohibits the parent companies (i.e. Enco, Meyer&Meyer and WKS GmbH) from operating in the business areas where WKS İstanbul is active directly or indirectly, professionally or occasionally, in its name or on behalf of other companies. Acquiring or supporting -by any means- any other company active in the same business area as the joint venture is also prohibited.

Secondly, it prevents WKS GmbH and Meyer&Meyer from operating directly or indirectly in certain markets where Enco is active without Enco's unilateral written consent. These markets are logistics, contra logistics, international and national transport, warehousing services, transport services, supply and distribution logistics, customs clearance, value added services, changes of goods, handling and packaging service.

These non-compete provisions are only applicable in Turkey and for two years after the withdrawal from the joint venture.

In its decision, the Board assessed the relevant contractual provisions within the scope of article 4 of Law No. 4054 on the Protection of Competition ("**Law No. 4054**") (akin to Article 101(1) of the TFEU), by also referring to the on-going litigation regarding the validity of the same non-compete clause under the Turkish Commercial Code No. 6102 ("**Turkish Commercial Code**").

1. The Validity of the Non-Compete Clause under the Turkish Commercial Code

Given that the non-compete clause is incorporated in WKS İstanbul's AoA and WKS İstanbul is a limited liability company, the Board first cited the provisions of the Turkish Commercial Code regulating non-compete clauses applied to limited liability companies. The Board noted that articles 579(1) and 613 of the Turkish Commercial Code require non-compete agreements to be related to the relevant company's fields of business, which illustrates the law maker's intention to limit the scope of non-compete agreements concluded among shareholders of a company.

The Board then mentioned the litigation before the Turkish commercial court by which Meyer&Meyer and WKS GmbH applied for a declaratory judgment on the invalidity of the non-compete provision which requires Enco's unilateral consent for these companies to operate in the fields where Enco is currently active. To that end, the commercial court² concluded that the relevant provision contained in WKS Istanbul's AoA is invalid as it infringes the principle of equity and articles 579(1) and 613 of the Turkish Commercial Code providing that the interest which should be protected through the non-compete clause shall be related to the joint venture, and not to the parent companies.

The relevant judgment of the commercial court has been appealed and the appeal process was still on-going on the date of the Board's decision. Given that there was not yet a final decision of the commercial court, the Board concluded that it had jurisdiction to examine the case within the scope of competition law.

2. The Board's Evaluation of the Non-Compete Obligation under Law No. 4054

The Board held that non-compete clauses which have the purpose of protecting competitors' interest may violate the regulations which aim to protect the free competition in the market. Such clauses may restrict new entries to the market and thus competition can be hindered or impeded. Upon the parties' request, the Board also analysed whether the non-compete clause at hand could benefit from negative clearance under Article 8 of Law No. 4054 or be exempted from the prohibition of Article 4 on the basis of Article 5 of Law No. 4054 (akin to Article 101(3) of the TFEU).

In this analysis, the Board first found that Enco and WKS Istanbul are operating in different markets. Thus, the non-compete provision in Article 12 of WKS Istanbul's AoA restricts the other parent companies' activities in the business areas where Enco –and not WKS Istanbul– is active. Based on this finding, the Board concluded that the relevant non-compete obligation is within the scope of article 4 of Law No. 4054 and thus a negative clearance cannot be granted to the AoA.

² Bakırköy Fifth Commercial Court of First Instance's judgment dated May 17, 2017 and numbered 2016/259 E. and 2017/450 K.

The Board then proceeded to an individual exemption examination for the relevant non-compete obligation pursuant to Article 5 of Law No. 4054. The Board held that as a general rule, a preventive or restrictive agreement between undertakings may fall under the protective cloak of the individual exemption if the relevant agreement (i) generates efficiencies, (ii) creates consumer benefit, (iii) does not eliminate competition in a significant part of the relevant market and (iv) does not limit competition more than necessary to achieve the efficiencies expected from the agreement. All these conditions must be met cumulatively.

Moreover, although the Board did not expressly refer to its Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions (“*Guidelines*”) – as the Guidelines only apply to concentrations requiring the Board’s approval, it can be seen that the provisions of the Guidelines applying to “ancillary restrictions” (paragraphs 48 to 58) appear to have shed light on the Board’s assessment under Article 5 of Law No. 4054. Indeed, paragraph 48 of the Guidelines provides that ancillary restraints are those that are directly related to the concentration and that are necessary to the implementation of the transaction and to fully achieving the efficiencies expected from the concentration. The Guidelines further provide that for being deemed as “directly related” to the concentration, the relevant restrictions should be closely related economically to the main transaction and should have been envisaged for a smooth transition to the new structure to be formed following the concentration (paragraph 50). As for the “necessity” of the restrictions, the Guidelines provide that the nature, duration and the scope of the restriction should be taken into account in this assessment (paragraph 51).

The Guidelines also provide that a non-compete obligation that is imposed on the seller could be deemed as an ancillary restriction provided that the scope of the relevant obligation –in terms of duration, subject and geographic area– does not exceed beyond what is reasonably necessary to implement the agreement (paragraph 53). Non-compete obligations that do not exceed three years are generally accepted as reasonable (paragraph 54). In case there is a high level of know-how and customer loyalty for the transferred business, a period longer than

three years may also be considered ancillary to the transaction³. On the other hand, in joint ventures, long-term or indefinite non-compete obligations preventing parents from competing with the joint venture may be accepted as ancillary restraints.⁴ Moreover, non-compete clauses must be limited to the goods and services comprising the area of operation of the economic unit to be acquired before the transaction. Lastly, non-compete obligations must be limited geographically to the area of operation of the undertaking to which the relevant clause is imposed. Although these provisions of the Guidelines apply to concentrations that require a mandatory merger control review of the Board, it could be asserted that they would also shed light to the examination under Article 5 of Law No. 4054 of a non-compete obligation contained in a joint venture agreement which does not qualify as a concentration.

In the case at hand, the Board examined the conditions of the individual exemption by taking into consideration the content, duration, and objective of the relevant non-compete obligation. As for the content, the Board noted that the non-compete obligation covers a wide area of activity. For instance, it limits the logistics and transport activities on a broad manner without even specifying which kind of products are targeted. As for its duration, the relevant provision is not limited for a certain period of time as it is open-ended. Finally, as for its objective, the Board noted that the provision aims at protecting the commercial interests of one of the parent companies, Enco, by prohibiting Meyer&Meyer and WKS GmbH from competing in the business areas where Enco is active.

In light of the above, the Board rejected granting individual exemption to the relevant non-compete obligation as it does not meet the criterion “*not limiting competition more than what is necessary*”.

All in all, the Board concluded that it is not necessary to launch an investigation against the investigated undertakings on the ground that (i) the Board has found no evidence showing that the relevant non-compete obligation affected the parties’ decision-making process and

³ The Board’s *LPD/LeasePlan* decision dated December 3, 2014 and numbered 14-47/862-392; *TPack-South East* decision dated December 23, 2010 and numbered 10-80/1685-639; *Stryker-Boston Scientific* decision dated December 2, 2010 and numbered 10-75/1530-586; *Corio Yatırım* decision dated December 25, 2008 and numbered 08-75/1188-457.

⁴ The Board’s *Investcorp Bank* decision dated December 5, 2013 and numbered 13-69/931-392.

strategies, (ii) Enco does not have any important market power in its areas of activities that are regulated by the non-compete obligation, and (iii) the relevant contractual provision has already been deemed as invalid by the commercial court of first instance (although the appeal process was still on-going).

That said, pursuant to article 9(3) of Law No. 4054, the Board ordered the parties to remove the relevant non-compete obligation from WKS Istanbul's AoA and register a modified version of the AoA at the Trade Registry within one year after the official service of the reasoned decision.

C. The Board's Notifiability Assessment on the Creation of WKS Istanbul

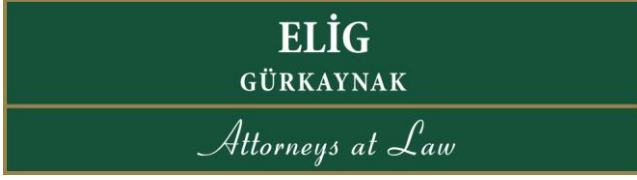
Lastly, the Board examined the question as to whether the establishment of WKS Istanbul in 2010 should be deemed as a concentration requiring the Board's approval.

In this respect, the Board recalled that the formation of a full-function joint venture would constitute an acquisition which would require a mandatory merger control review of the Board provided that it triggers the applicable jurisdictional thresholds.

The Board noted that WKS Istanbul has been a full-function joint venture since its establishment. That said, as the applicable jurisdictional thresholds were not triggered, the creation of WKS Istanbul was not notifiable in Turkey.

D. Conclusion

The Board sets a prominent precedent in this decision regarding its competence in assessing non-compete obligations imposed upon the parties to a joint venture agreement which may also fall under the commercial law. Further, although the decision does not refer to the concept of "ancillary restraints" in concentrations –given that the creation of WKS Istanbul has not been deemed as a notifiable transaction– the provisions of the Guidelines applying to ancillary restraints appear to have shed light on the Board's assessment in this case.



Finally, the decision is also important as the Board opted for an effect-based assessment instead of an object-based analysis for deciding not to initiate an investigation against the relevant undertakings.

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