

***High level of dependency on parent companies: The joint venture between Voith and MOOG was considered non-full function and has been granted negative clearance by the Turkish Competition Board***

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## **I. Introduction**

The Turkish Competition Board (the “**Board**”) has published its reasoned decision<sup>1</sup> concerning the request for approval regarding the transaction involving a formation of a joint venture, Hybrid Motion Solutions GmbH (“**JV**”) between J. M. Voith SE & Co. KG (“**Voith**”) and MOOG Gesellschaft mit Beschränkter Haftung (“**Moog**”). The Board’s assessment on the full-functionality criteria in the decision is noteworthy as it includes a comprehensive analysis in terms of Article 4 of Law No. 4054 on the Protection of Competition (“**Law No. 4054**”).<sup>2</sup>

Before delving into its substantial assessment, the Board provided general information on the parent companies’ activities along with the contemplated activities of the newly-established JV. Accordingly, Voith, which is a wholly owned subsidiary of Voith GmbH & Co KGaA (“**Voith Group**”), is a technology company providing a wide range of products, services and digital applications in the sectors of energy, petroleum & gas, raw and transportation & automotive. Moog, a subsidiary of Moog Inc. (“**Moog Group**”), is mainly active in three fields, namely (i) aircraft controls, (ii) aerospace and defence controls and (iii) industrial systems. More specifically, it engages in the development of high performance driving and control technology for test and simulation applications in the automotive and aviation industries as well as the industrial plant applications in metal forming and plastic processing and motorsport applications. With regards to the JV’s activities, the parties planned that the JV would develop and provide servo-hydraulic actuation through which the servo-hydraulic

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<sup>1</sup> The Board’s decision dated April 9, 2020 and numbered 20-19/259-125.

<sup>2</sup> Article 4 of Law No. 4054 is a reflection of Article 101 of the Treaty on the Functioning of the European Union (“**TFEU**”). It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices having (or which may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish products and/or services market or a part thereof.

actuators were utilized as an independent axle or the electro hydrostatic actuator (“**EHA**”). The JV was not expected to have any activities in Turkey.

Following the assessment of the parties’ activities, the Board went on analysing the transaction in terms of Article 7 of Law No. 4054 by essentially focusing on whether (i) the transaction involves a control change on a lasting basis and (ii) the JV is of full-function nature.

Before delving into the analysis of the Board on the substantial matters, it may be useful to understand the Board’s approach on what constitutes full-functionality:

## **II. Full-functionality of the Joint Ventures under the Turkish Merger Control Regime**

The Turkish merger control rules applicable to joint ventures are akin to the European Union competition rules. Article 5 of the Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (“**Communiqué No. 2010/4**”) sets out a definition of joint venture, which does not fall far from the definition used in the EU law. On this front, paragraph 79 of the Guidelines on the Conditions Accepted as Mergers and Acquisitions and the Concept of Control (“**Control Guidelines**”) provides that “(...) *the full-functionality criterion is the basic requirement for the application of the Communiqué to joint ventures established by the parties in cases where the joint venture is created as a "greenfield operation" or the parties contribute assets to the joint venture which they previously owned individually. In other words, in these circumstances, the joint venture must fulfil the full-functionality criterion in order to constitute a transaction under the scope of article 7 of the Act*”.

In light of the foregoing, under the Turkish merger control regime, in order for a joint venture to have a full-function character, a joint venture should qualify as an independent economic entity established on a lasting basis meaning that it has adequate capital, labor and an indefinite duration. To that end, as set out under paragraphs 81-93 of the Control Guidelines, the joint venture should: (i) have sufficient resources to operate independently, (ii) make

activities beyond one specific function for the parents, (iii) be independent from the parent companies in sale and purchase activities, and (iv) operate on a lasting basis.

Overall, based on both the legislation and the Board's jurisprudence, in cases when a joint venture is not full-function, it would not require a mandatory merger control filing under the applicable Turkish competition law regime. Established precedents of the Board provide further guidance on the matter.<sup>3</sup> More specifically, in *JAA/PBM* and *DSM/Evonik*, the Board concluded that since the joint venture's activities would be limited to the sales of its parent companies' products and it would not have activities beyond one specific function for the parents, the Board determined that the joint venture would not perform all the functions of an autonomous economic entity. Furthermore, in *OMV/Shell&Turcas*, the Board acknowledged that the joint venture would operate dependently on its parent companies and it was not able to make its strategic decisions independently from its parents and thus it would not be full-function.

In light of the foregoing, it is evident that the Board seeks certain level of independency for the joint ventures. While any business-wise support (such as sales to parents or supply from parents) from the parent companies, when a joint venture commences operating, is somewhat necessary, the Board limits dependency of a joint venture on its parents with three years as of its establishment (i.e. initial start-up period). Indeed, para. 85 of the Control Guidelines explicitly states that a joint venture can sell to and supply from its parent companies only during the beginning of its commercial life and this would not affect the full-function character of that joint venture. This is because such relationship with parents may be essential for a joint venture to find a place and maintain its activities in the relevant market. Nevertheless, the case law of the Board indicates that the Board has been consistent in drawing a line between full-functionality and non-full-functionality, when it finds a joint venture too dependent on its parents more or longer than necessary.

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<sup>3</sup> E.g. The Board's *JAA/PBM* decision, 19-03/20-9, 10.01.2019; *DSM/Evonik* decision 17-35/573-248, 26.10.2017; *OMV Petrol Ofisi/Shell&Turcas* decision, 14-20/382-166, 05.06.2014; *Opet/Aygaz* decision, 13-52/734-307, 12.09.2013; *Türkiye Petrol Rafinerileri A.Ş.* decision, 12-36/1041-329, 04.07.2012; *Oyak/Ayas* decision, 09-34/839-204, 05.08.2009; *NLR/Global Tekstil/NLT Tekstil* decision, 05-74/1000-280, 27.10.2005; *Netcell* decision, 02-56/697-281, 19.9.2002.

### **III. A dual analysis under Article 7 and Article 4 of the Law No. 4054**

#### ***A. Evaluation under Article 7***

Article 7 of Law No. 4054 (akin to Article 102 of TFEU) governs mergers and acquisitions in particular and authorizes the Board to establish a merger control regime. In its substantive assessment, the Board primarily evaluated the transaction within the scope of Article 7 of Law No. 4054 and considered the criteria for the notifiability of a JV under Article 5(3) of Communiqué No. 2010/4, namely (i) the existence of joint control and (ii) formation of an autonomous economic entity (full-functionality).

In its analysis of whether the joint control criterion is satisfied, the Board stated that (i) parent companies would have the equal voting rights at the JV's board meetings, (ii) they would also have veto rights over strategic decisions and (iii) the strategic decisions concerning the JV would be made unanimously. Accordingly, the Board concluded that the JV would be jointly controlled by Voith Group and Moog Group within the meaning of Communiqué No. 2010/4.

Subsequently, the Board examined whether the newly established JV would be an autonomous economic entity meaning that it would be operationally independent from its parent companies within the scope of the proposed transaction. The parties highlighted that the JV would have its own financial resources including human resources, R&D, logistics, management and staff dedicated to its day-to-day operations and that it would have a five-year business plan agreed upon, to be able to carry out its business as an autonomous business entity on a lasting basis.

However, the Board found that although the JV would have its own manufacturing activities, it would still make most of its sales to its parent companies and would supply a certain amount of input materials from its parent companies according to the JV's business plan. Additionally, the Board decided that the JV would not have an independent decision making mechanism from its parent companies by taking into consideration that the members of its advisory board -which would be a decision making body that will supervise the board of

directors-, would remain their positions in Moog Group and Voith Group post-proposed transaction.

The Board thus concluded that as the JV would not perform all the functions of an autonomous economic entity on a lasting basis, the JV would not be full-function and the formation of such JV would not be considered as an acquisition either within the meaning of Article 5 of Communiqué No. 2010/4.

#### ***B. Evaluation under Article 4***

A joint venture is not in itself a restriction of competition, but it may be contrary to Article 4 of Law No. 4054. Indeed, non-full-function joint ventures are assessed under the restrictive agreements theory as they can be a means for the parent companies to coordinate their behaviour on the market, either between themselves, or with the joint venture itself.

Given that the Board found that the JV is of non-full-function nature, it evaluated that the transaction would be considered as an agreement which could fall under Article 4 of Law No. 4054 and accordingly examined whether the transaction would lead to coordination between Voith Group and Moog Group.

As per its competitive assessment on the coordination effects in the market for EHA in Turkey, the Board determined that (i) none of the entities controlled by Moog Group and Voith Group are active in the same market as the JV, or in the upstream or downstream market of the relevant product market, or in a neighboring market that is closely related to such market in which the JV would operate in Turkey and that (ii) the JV would not be active in any market in Turkey; thus the proposed transaction would not raise any competition law concerns in Turkey.

Furthermore, the Board assessed the horizontal overlaps and vertical relationships between the parent companies' activities on a global scale and accordingly decided that even though there would be horizontally or vertically affected markets in terms of single or separate



market definitions of EHA, the parent companies would have lower market shares taking into account the numerous global competitors with high market shares.

Consequently, the Board ultimately decided that as (i) the JV would not be active in any market in Turkey and (ii) the parent companies' activities would not horizontally overlap or be vertically linked in Turkey, the transaction would not lead to any coordination effects and the contemplated transaction would not result in creation or strengthening of a dominant in Turkey. Consequently, the Board granted negative clearance to the proposed transaction as per Article 8 of the Law No. 4054.

#### **IV. Conclusion**

The relevant decision is one of the recent examples of the Board's precedent in which it runs a full-functionality test within the scope of Article 7 of Law No. 4054. The decision demonstrates the Board's approach on the level of dependency of joint ventures on parent companies, which occasionally becomes a blurry matter in terms of a green-field joint venture to qualify as a full function joint venture.

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