e-Competitions

Antitrust Case Laws e-Bulletin

Concurrences
Antitrust Publications & Events

Old articles

The Turkish Competition Authority evaluates the transaction concerning the acquisition of sole control of a shipping company by a terminal investor *(TIL / Marport)*

MERGERS, JOINT-VENTURE, OTHER SERVICES, GEOGRAPHIC MARKET, TEST SLC (MERGER), TURKEY, CHANGE OF CONTROL, OLIGOPOLY, EFFECT ON COMPETITION, TRANSPORT (SEA)

Turkish Competition Authority, *TIL / Marport*, Case 20-37/523-231, 13 August 2020 (Turkish)
With the contribution of Aslı Su Çoruk and Esma Aktaş.

Gönenç Gürkaynak | ELIG Gürkaynak Attorneys-at-Law (Istanbul)
Eda Duru | ELIG Gürkaynak Attorneys-at-Law (Istanbul)
Betül Baş Çömlekçi | ELIG Gürkaynak Attorneys-at-Law (Istanbul)

e-Competitions News Issue Old articles

This case summary includes an analysis of the Turkish Competition Board's ("**Board**") Marport decision [*1*] in which the Board evaluated the transaction concerning the acquisition of sole control of Marport Liman İşletmeleri Sanayi ve Ticaret Anonim Şirketi ("**Marport**") by Terminal Investment Limited Sàrl ("**TIL**") within the scope of Article 7 of the Law No. 4054 on the Protection of Competition ("**Law No. 4054**"). In its competitive assessment, the Board applied the Significant Impediment to Effective Competition ("**SIEC**") test which had been recently introduced to the Turkish competition law enforcement by the Law No. 7246 Amending the Law on the Protection of Competition ("**Law No. 7246**") [*2*]. In its evaluation, the Board also took into consideration market-specific factors such as the narrow oligopoly market structure, the high level of concentration and the competitors in the markets concerned and ultimately refused to grant clearance to the transaction.

Background

The transaction concerned the acquisition of Marport's 50% of the shares and sole control by TIL. Prior to the transaction, Marport was jointly controlled by TIL and Arkas Group [*3*] . In this respect, the transaction concerned the change from joint to sole control over Marport.

TIL was founded in 2000 and it invests in, develops and manages container terminals globally. TIL is jointly controlled by Mediterranean Shipping Company ("MSC") and Global Infrastructure Partners. It has indirect shareholdings in various Turkish port operating companies. TIL holds 70% of the shares in Asyaport Liman A.Ş.

("Asyaport") through its subsidiary Global Terminal Limited Sàrl and jointly controls Asyaport together with Ahmet Soyuer. TIL also holds %50 indirect shareholding in Assan Liman İşletmeleri A.Ş. which is active in the container and cargo handling services in Turkey.

Further to its Phase I review, the Board decided to take the transaction into a Phase II review on October 31, 2019 (with decision no. 19-37/555-M). The case team of the Turkish Competition Authority recommended in their Phase II investigation report that a clearance could be granted to the transaction.

The Assessment on the Relevant Product Market and the Relevant Geographic Market

The Board stated that the transaction mainly related the container terminal management sector while Marport's other activities included temporary storage, pilotage and towage and ancillary port services. The Board defined the relevant product market as "port management for container handling services" by referring to its Limar/Mardaş [*4*] decision. The Board also made two separate downstream market definitions as (i) port management for container handling services concerning transit traffic and (ii) port management for container handling services concerning hinterland traffic.

As for the relevant geographic market, the Board preferred a narrow definition and defined the relevant geographic market as "Northwest Marmara" for the markets concerning local loads. However, the geographic market definition for the markets concerning transit loads was left open. In defining the relevant geographic markets, the Board took into consideration various factors such as the location of the ports, the transportation facilities and the customer choices.

Competitive Assessment

In its competitive assessment, the Board stated that the transaction led to a horizontal overlap in the port management for container handling services market and a vertical overlap in the container line transportation market. The Board applied the SIEC test rather than solely assessing whether the transaction led to the creation or strengthening of a dominant position in the relevant markets. The Board stated that in cases where the acquiring party is active in the same relevant product market or one of the upstream or downstream markets and has a significant market power in which the target is also active, the transaction may lead to competitive concerns within the scope of Article 7 of the Law No. 4054. In this respect, the Board evaluated TIL's relationship with MSC and Asyaport. After examining the sales concerning the local and transit loads made by these undertakings, the Board stated that TIL and Asyaport were joint ventures that rendered services to MSC and MSC had a significant influence on these undertakings. Moreover, the

activities of TIL and Asyaport could not be separated from MSC's activities as they constituted a part of MSC's activities. MSC was the major customer of Marport and, similarly, Asyaport rendered almost the entire of its services to MSC for local and transit loads.

In addition, the Board evaluated the market shares of the undertakings operating in the container handling services concerning local loads in Northwestern Marmara between 2015 and 2019 and found that Marport was the leader in the market followed by Kumport and Asyaport. The Board stated that, despite the fact that Kumport was the second biggest undertaking operating in the relevant product market and an important competitor, the acquisition of sole control of Marport, the biggest player in the relevant product market, by TIL, by taking into account the fact that MSC operated Asyaport, would further increase the concentration level in the product market in which the concentration level is significantly high at present. In this regard, the Board stated that, considering that Marport and Kumport were the biggest players in the market, it could be inferred that the market was a narrow oligopolistic market which resembled a duopoly, noting that the other undertakings had relatively low market shares in the relevant product market. In its assessment, the Board also referred to Herfindahl-Hirschman Index ("HHI") and concluded that the proposed transaction would lead to a remarkable growth of the HHI level on the market. Therefore, this would reduce the competition between the competitors and lead to price increases.

Moreover, the Board evaluated the established capacity of the North-west Marmara Region ports combined and Marport and Asyaport separately. Upon its assessment, the Board stated that, bearing in mind that MSC was one of the biggest line operators on a global scale, when evaluated together with its significant presence in the area of line transportation, the fact that MSC would operate a significant part of the container handling capacity of the North-west Marmara Region was likely to create a disadvantage for other line operators that use the ports in the Northern Marmara Region and increased the costs for these line operators. The Board highlighted that this might especially be the case when there was not enough capacity available for other line operators. Despite the fact there was an increasing demand on the market, there was still an existent capacity for other undertakings. However, the Board did not find this mere fact sufficient to eliminate the competitive concerns with regard to the transaction due to the fact that post-proposed transaction; MSC would control 60% of the transit handling services in Northwestern Marmara. The Board stated that this would ultimately cause competitive concerns to arise.

As for the entry barriers, the Board determined that the infrastructure and superstructure of a port together with the related equipment required for the port services constitute entry barriers in the container line transportation and container handling services markets. The Board also determined that, besides investment costs, other barriers to entry in the relevant market include the regulatory approval processes, the transmission costs necessary for crossing from one port facility to another, natural obstacles due to the size of the land or the permanent facility necessary for the operation and certain conditions included in the port operation agreements.

Finally, the Board also evaluated the ongoing project that connects Asyaport to the existing railway line. The Board determined that in the event that the relevant project was materialized, Asyaport would be capable of serving the Northwest Marmara Region as well as Istanbul to a greater extent via the railway line extending into its port. Considering the above mentioned facts, the Board stated that Marport, located at the Ambarlı Port Facilities, handled approximately 90% of the total local load volume in the Northwest Marmara Region. The Board also acknowledged that in the event that the relevant railway line project was actualized, Asyaport would be a substitute to Marport. However, as TIL already held 70% of the shares in Asyaport, and the railway project would make Asyaport a substitute for Marport, the acquisition of Marport by TIL would mean that the two ports that were current competitors and/or future substitutes would be operated by the same undertaking, TIL.

In conclusion, taking into account that the transaction was likely to cause significant impediment of effective competition, the Board refused to grant clearance within the scope of Article 7 of the Law No. 4054.

Conclusion

The Board's no-go decisions are very rare. The Marport decision is of significant importance as it constitutes a recent example in which the Board decided not to clear a joint-to-sole control transaction further to its detailed competitive assessment based on the SIEC test which was recently introduced to the Turkish Competition law

Concurrences
Antitrust Publications & Events

enforcement. The decision also sheds light on the Board's approach on market definitions as well as various market specific factors in the evaluation of possible competitive concerns in the port management for container handling services market and the container line transportation market.

[*1*] The Board's Marport decision dated 13.08.2020 and numbered 20-37/523-231.

[*2*] The Law No. 7246 entered into force by being published in the Official Gazette dated 24.06.2020 and numbered 31165.

[*3*] Arkas Group includes Arkas Holding A.Ş., Arkas Lojistik A.Ş., Limar Liman ve Gemi İşletmeleri A.Ş. (LİMAR), Lucien Arkas vand Diane Arcas Göçmez.

[*4*] The Board's *Limar/Mardaş* decision dated 08.05.2018 and numbered 18-14/267-129.