Is the Turkish Competition Board Starting to Scrutinize Ancillary Restraints More Rigorously? - Vinmar/Arısan Transaction is Approved on the Condition that Scope of Non-Compete and Non-Solicit Obligations is Limited

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(1) Introduction

This article aims to provide information regarding the ancillary restraints under Turkish Merger Control Regime and also analyses the Turkish Competition Board's ("***Board***") *Vinmar/Arısan* decision[1] which provides insight into the Board's approach to assessing the scope of ancillary restraints in merger cases and foreshadows potentially stricter scrutiny over such restrictions. Even though the transaction concerning the acquisition of sole control over Arısan Kimya Sanayi ve Ticaret Anonim Şirketi ("***Arısan***") and Transol Arısan Kimya Sanayi ve Depolama Limited Şirketi ("***Transol Arısan***") (together, "***Target Group***") by Vinmar Group ("***Vinmar***") through Veser Kimyevi Maddeler Anonim Şirketi ("***Veser***") seems to be non-problematic from a substantive standpoint, the Board conducted an elaborate assessment as to whether the non-compete and non-solicit obligations that are intended to be imposed on the sellers of the Target Group would qualify as ancillary restraints. Further to its assessment, the Board conditionally approved the transaction by deciding that the scope of non-compete and non-solicit obligations should be rather limited.

(2) Assessment of Ancillary Restraints under Turkish Merger Control Regime

As per paragraph 48 of the Turkish Competition Authority's (the "***Authority***") Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions (the "***Guidelines***"), the restrictive obligations should be directly related and necessary to the transaction to be permissible as ancillary restraints. Paragraph 53 of the Guidelines set forth

[1] The Board's *Vinmar/Arısan* decision, dated 24.02.2022 and numbered 22-10/155-63

that non-competition clauses may only be justified by a legitimate objective of implementing the transaction when their duration, their geographical field of application, their subject matter and the persons subject to them do not exceed what is reasonably necessary to achieve that objective.

The Board's precedent and paragraph 54 of the Guidelines provide that as a rule of thumb, restrictive covenants that are imposed on the parties within the scope of a transaction should be limited to three years. That being said, paragraph 54 of the Guidelines also indicates that in case there is a high level of know-how and customer loyalty for the transferred business, a longer period than three years should also be considered ancillary to the transaction. Indeed, there are numerous cases where the Board has found non-compete clauses as ancillary restraints that were envisaged to be in force for five years.[2]

Paragraph 57 of the Guidelines indicates that restraints concerning the seller itself and those economic units and agencies which constitute an economic unit with the seller may be accepted as reasonable, while any non-competition obligations beyond them, especially those concerning the dealers of the seller or users, shall not be accepted as necessary and related.

According to paragraph 55 of the Guidelines, as a rule, non-compete obligations must be limited to those goods and services comprising the area of operation of the economic unit to be acquired before the transaction. In fact, in a previous case, the Board indicated that the non-compete obligation within the scope of the relevant transaction imposed restrictions in terms of other activities that were out of the scope of the activities of the joint venture and therefore could not be regarded as an ancillary restraint.[3]

The geographical scope of a non-competition clause must be limited to the area in which the seller offers the relevant products or services before the share transfer, since the purchaser does not need to be protected against competition from the seller in territories, which have not been previously penetrated by the seller. In fact, in a previous decision, the Board remarked that the non-compete obligation could only be considered as an ancillary restraint if its geographic scope would be limited to the city of Istanbul rather than Turkey, given that the

[2] The Board's Ren/Bimed decision dated 16.12.2021 and numbered 21-61/868-BD, LeasePlan/LPD decision dated 03.12.2014 and numbered 14-47/862-392, UZC/Park Holding decision dated 26.03.2014 and numbered 14-12/221-97, TPack-South East decision dated 23.12.2010 and numbered 10-80/1685-639, Stryker-Boston Scientific decision dated 2.12.2010 and numbered 10-75/1530-586, Corio Yatırım decision dated 25.12.2008 and numbered 08-75/1188-457.
[3] The Board's Jantsa/MW decision dated 21.12.2011 and numbered 11-62/1632-569.

geographic market for the relevant case only related to Istanbul.[4] Similarly, in a recent case, the Board determined that the Turkey-wide non-compete obligation imposed on the seller was not limited to the area in which the seller was active, its geographic scope exceeded what was reasonably necessary to implement the transaction, and it would only qualify as an ancillary restraint if its scope was limited to West Mediterranean region.[5]

(3) Alternative Approaches for Dealing with Ancillary Restraints in Merger Control Filings from a Practical Standpoint

Since the entry into force of Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("***Communiqué No. 2010/4***"), and specifically, under Article 13(5) of Communiqué No. 2010/4 as well as paragraph 45 of the Guidelines, it is stipulated that approval granted by the Board concerning a transaction shall also cover those restraints which are directly related and necessary to the implementation of the transaction (i.e. ancillary restraints), with the principle being that the parties should determine whether the restraints introduced by the transaction agreement exceed this framework (self-assessment). In other words, with this new approach, the Board has placed the burden on the transaction parties to make the determination and in case where the parties fail to correctly analyse whether a restriction qualifies as an ancillary restraint, the risk would remain on the parties even in case where they obtain an unconditional approval decision. As per paragraph 46 of the Guidelines, if the concerned restraints have a novel aspect which has not been previously addressed by the Board in its case law or the Guidelines, the parties can make a specific request in the merger control filing for the Board to assess the ancillary nature of such restrictions. In this respect, it is noteworthy that under Article 13 of Communiqué No. 2010/4, the approval granted for a transaction would cover only the restrictions that are directly related and necessary to the implementation of the transaction and would not cover those that are overly broad.

Based on the foregoing, if the transaction parties consider that the non-compete/non-solicit obligations would not be deemed as excessive and beyond an ancillary restraint, the parties might consider not explicitly discussing it within the merger control filing and provide detailed explanations as to why such restrictions are directly related and necessary for the transaction, and thus should be accepted as ancillary restraints. However, if the parties have

[4] The Board's UZC/Park Holding decision dated 26.03.2014 and numbered 14-12/221-97.
[5] The Board's QTerminals/Port Akdeniz decision dated 26.11.2020 and numbered 20-51/708-316.

doubts as to whether the relevant restrictions would qualify as ancillary restraints, in order to reach full legal certainty, the prudent approach might be to disclose the non-compete/non-solicit clauses and provide as many arguments as possible in the merger control filing. As an alternative, the parties might also restructure/amend the relevant clauses prior to the notification in a manner to ensure that the scope of such restrictions does not extend beyond the limit that is reasonable to qualify as ancillary restraints if this is feasible from a commercial perspective.

All in all, there are broadly two approaches when dealing with ancillary restraints in merger control filings. The first approach is to discuss the non-compete/non-solicit obligations explicitly in the notification form and provide reasons as to why such provisions are directly related and necessary, and thus should be accepted as an ancillary restraint. The second approach would be not to provide any representations of the restrictions in the notification form. If the parties prefer representing the non-compete/non-solicit obligations within the notification form, the parties would also need to formulate solid arguments to justify why these restrictions ought to be considered directly related and necessary to the transaction.

(4) The Board's Assessment in Vinmar/Arısan Decision

The transaction concerns the acquisition of sole control over Arısan and Transol Arısan (i.e., the Target Group) by Vinmar through Veser. In terms of the substantive assessment of the transaction, the Board indicated that the Turkey-related activities of the Target Group and Vinmar horizontally overlapped in the markets for distribution of chemicals for (i) cosmetics and personal care sector; (ii) household and industrial cleaning sector; (iii) food sector; (iv) pharmaceuticals sector (including veterinary chemicals and active ingredients) and (v) mineral oil sector. Considering the limited market shares of the parties and strong competitors in the markets, the Board found that the transaction would not result in any horizontal competition law concerns. Also, the Board remarked that although there might be a potential vertical link between the parties, any actual or potential vertical relationships would be negligible and would not result in any foreclosure impacts, given the parties' limited market shares.

Aside from the competitive assessment of the transaction, the Board indicated that the transaction agreement included non-compete and non-solicit obligations which would remain in effect for four years following the transaction, would be limited to Turkey, and would only apply to the employees of the sellers and the acquired undertakings. In terms of the duration

of the obligations (i.e., four years), the parties explained that there is a high level of know-how that is being transferred, therefore the parties aim to establish long-term business relations with customers in the specialty chemicals market, the duration reflects the parties' mutual agreement, and a shorter non-compete obligation would not be sufficient for the parties to achieve the expected economic value from the transaction. However, taking into account the market structure, customer loyalty and know-how, the Board indicated that the duration of the non-compete and non-solicit obligations should be limited to three years. In this respect, the Board approved the transaction on the condition that the duration of non-compete and non-solicit obligations are reduced to three years.

Considering that there are numerous cases where the Board allowed for non-compete/non-solicit obligations whose duration was five years and determined that such obligations would quality as ancillary restraints, it might be argued that the Board's assessment in the case at hand that the relevant obligations should be reduced from four to three years, despite the parties' detailed explanations regarding the justification of the duration, had been too strict. In that case, it seems questionable as to whether the Board's approach to interfere with the relevant clauses/obligations might constitute excessive enforcement, in particular since the transaction at hand did not result in any substantive competition law concerns. This point was previously raised in the dissenting opinion of the then Chairman of the Board (Prof. Dr. Nurettin Kaldırımcı) in UZC/Park Holding decision[6] where he argued that there was no reason from a competition law standpoint to leave aside the freedom of contract and interfere with the agreement between the parties to approve the transaction on the condition that the duration and geographic scope of the non-compete obligation were narrowed down, when in fact the transaction did not raise any competitive concerns. However, it seems that the Board still prefers to analyse whether such obligations qualify as ancillary restraints irrespective of the impact of the transactions in the competitive landscape of the markets and the Board would interfere with the adoption of such obligations whenever it considers that they exceed what is reasonably necessary to implement the transaction.

(5) Conclusion

The decision sheds further light on the Board's recent viewpoint regarding the assessment of non-compete/non-solicit obligations in mergers (i.e., as to whether they would qualify as ancillary restraints in certain conditions) and allows transaction parties to reconsider whether

[6] The Board's UZC/Park Holding decision dated 26.03.2014 and numbered 14-12/221-97.

they would prefer to discuss such restrictions in the merger control filing explicitly. The Board's decision might mark the beginning of an era in which ancillary restraints are scrutinized more rigorously and the Board adopts stricter criteria for non-compete/non-solicit obligations to qualify as ancillary restraints. If that would be the case, the transaction parties might prefer not to open these restrictions into the discussion with the case handlers of the Authority by elaborately explaining them in the merger control filing. Instead, if the transaction parties suspect that the Board might find the restrictions unreasonable and excessive for the purposes of the transaction, they might prefer to amend the relevant clauses in the transaction agreements that stipulate such restrictions prior to the notification to make sure that they would qualify as ancillary restraints in line with the Guidelines and the Board's decisional practice.

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(First published by Mondaq on September 28, 2022)