

## Notifiability of Non Full-Function Joint Ventures

**T**urkish Competition Board ("**Board**") with its Juki decision (19 of January/2022, 22-04/57-26), unconditionally approved the acquisition of joint control over Mitsubishi Electric Corporation's ("**Melco**") industrial sewing machine business and Meiryo Technica Corporation's ("**Meiryo**") industrial sewing machine business ("Target") by Melco and Juki Corporation ("**Juki**"). Remarkable point of the decision is the consideration of the Board that the transaction will lead to a structural change in the market, which renders it a notifiable transaction, although the existing undertaking will not be a full-functional joint venture post-transaction.

On that front, paragraph 78 of the Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control sets forth an exception by stipulating that *"the acquisition of joint control will lead to a structural change in the market even if, according to the plans of the acquiring undertakings, the acquired undertaking would no longer be considered full-function after the transaction"*. The same paragraph further states that "a transaction involving several undertakings acquiring joint control of whole or parts of another undertaking [...] from third parties will constitute a concentration within the scope of the Act according to the Communiqué without it being necessary to consider the full-functionality criterion".

As far as the wording of this paragraph is concerned, this exception is applicable only in case of a transaction involving *"several undertakings acquiring joint control of another undertaking or parts of another undertaking"*. However, the application of the above-mentioned paragraph was ambiguous due to the limited number of decisions on this topic.

Although this wording is not crystal clear, the general interpretation had required the previous controlling shareholder(s) of the target over which the joint control would be established to exit the picture post-transaction. In its Lodos decision (14 of August/2018, 18-28/468-227), the Board evaluated the transaction as a concentration since the previous sole controller was out of the picture post-transaction.

However, the Board's Aggreko decision (29 of April/2021, 21-24/290-132) raised question marks on the Board's interpretation of the above exception since it provides that the establishment of a joint venture on an existing undertaking will be deemed as a concentration, without examining the condition for *"acquiring joint control of another undertaking or parts of another undertaking"*.

In its Europcar decision (25 of November/2021, 21-57/803-398), the Board emphasized that it is not necessary to consider full-functionality where the transaction concerns



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establishing joint control over an existing undertaking.

With its *Juki* decision, the Board reinforced its approach in the *Aggreko* and *Europcar* decisions by stating that the transaction would still result in a structural change in the market although Melco, the sole controller of the Target pre-transaction, remains as one of the joint controllers of the Target post-merger.

Although occasionally its motives are not very clear from the wording of the decisions, the Board has been aligning its assessments on the grounds found in the Control Guidelines in its various decisions, concluding that the full-function criterion is not necessary for a transaction to constitute a concentration. However, as the Board's approach has not yet been challenged by a judicial review, the question as to whether the Board will continue to overlook the full-functionality criteria regarding the establishment of joint control over existing undertakings still remains to be answered in light of future developments

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## Practice Area News

**Ancillary Restraints Under the Radar.** With its three recently published decisions (*Arısan* (24 of February/2022, 22-10/155-63); *Adatıp* (24 of March 2022, 22-14/233-101); *Checklas* (14 of April/2022, 22-17/286-130)), the **Turkish Competition Board** made it clear that the duration and extent of non-compete/non-solicit obligations even in non-problematic mergers may be under close scrutiny. However, the decisions led to questions on whether the Board can *ex officio* conditionally approve transactions that the parties have not submitted commitments to and whether such restrictions qualify as ancillary restraints.

**Withdrawal of Group Exemption.** Previously, the **Turkish Competition Board** had initiated a preliminary investigation against Unmaş Unlu Mamuller Gıda San. ve Tic. A.Ş for engaging in activities aimed at de facto exclusivity that actually benefited from block exemption and decided not to initiate a full-fledged investigation but to investigate the previously given block exemption. Accordingly, the **Turkish Competition Board** with its recent decision (07 of January/2022, 22-32/506-203) decided to withdraw Unmaş's block exemption.

**Dual Application of Settlement and Leniency Regulations.** The recent decisions of the **Turkish Competition Board** concerning mineral water producers (*Kirik* (14 of April 2022, 22-17/283-128); *Beypazarı* (18 of May/2022, 23/379-158)) are the first examples of where the dual application of settlement and leniency took place under Turkish competition law regime. The decisions mark the milestones that dual application is possible if a leniency application is made before the submission of the settlement text in investigations concerning cartel arrangements.

**The Turkish Competition Board Rejected Getir's Settlement Request.** The **Turkish Competition Board** initiated an investigation against, among others, Getir Perakende Lojistik A.Ş. for the allegations that the investigated undertakings were preventing employees' transfer through gentlemen's agreements and wage fixing. Although Getir requested to initiate the commitment procedure, it was rejected by the **Turkish Competition Board**. Accordingly, Getir requested the decision to be reconsidered and was rejected again on the ground the said acts constituted naked and hard-core infringements hence was not suitable for commitment. (11 of November/2021, 21-55/765-381).

## In the Firm

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